No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX - VOLUME III

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TESTIMONY OF LAWRENCE FITZPATRICK

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[Tr. 64] BY MR. MOTLEY:

Q. And you're personally familiar with that?

A. Yes. Yeah. Having read the stipulation, I am aware that they're there.

(Pause in proceedings.)

Q. Now, sir, I want to turn to a different subject matter.

You announced — excuse me — you testified yesterday that the Center for Claims Resolution adopted a policy that predates the Georgine negotiations with respect to settlement of or so-called inventory settlement of cases. Do you recall that testimony?

A. I do.

Q. For the record again, and as a foundation for my questions, will you describe again for the Court what that means?

A. I — to be — to fully explain our settlement philosophies since inception, the first two years of our operation, 1989 and 1990, we engaged in a substantial number of block or inventory settlements. After the initial two-year period, in spite of the fact that we had settled thousands and thousands of cases, we found that the backlog against our members had actually increased due to the number of new filings.

At that point, we decided to reexamine our settlement philosophy and for the next two years of our [Tr. 65] existence, did not engage in large-scale inventory settlements unless we could get pleural registries in various jurisdictions as protections for the future. So that we didn't find ourselves settling 10,000 claims in a given jurisdiction and finding ourselves with 15,000 claims anyway because of the new filings, so that became our position in the next two years of our existence.

And I think that's what I was testifying about yesterday.

Q. Would you characterize the New England, as you have described that more narrowly being Massachusetts and Connecticut and maybe some smaller pockets of cases, settlement which you've described in detail earlier this morning as an example of the type

of inventory settlement that CCR was willing to negotiate and in fact did negotiate?

A. Yes. With the caveat that the New England deal was not just the CCR. It was all the other —

Q. I understand —

A. — major defendants.

Q. — that, but I want to focus solely on the CCR.

A. Yes, sir.

Q. Since that time, sir, and I'm excluding Ness, Motley and Greitzer and Locks from this question, has these — and I'm also stating profiling of Georgine —

A. Okay.

* * * *

[Tr. 66] Q. — were other such settlements reached with law firms that met the criteria that you've described to the Court for inventory settlements?

A. The pleural registry criteria, is that what we're talking about?

Q. Yes.

A. Not that I'm aware of.

Q. Okay. Have you settled since Georgine was filed present inventories with some sort of future agreements with other law firms than Ness, Motley and Greitzer and Locks since Georgine was filed in January, 1993?

A. Yes, sir.

Q. One or two firms or how would you describe it? I don't want to put words in your mouth.

A. Well, when we became reasonably confident that Georgine would be successful, we then attempted to fulfill our commitment to settle the pending inventory over the next three to five years. And we have certainly settled many thousands of pending inventory claims since the point in time we became confident Georgine would be likely to happen.

Q. Now, sir, let me ask you a few questions about some allegations that have been made about the conduct of class counsel in this case.

Are you aware, sir, of any provisions in the Georgine settlement which address specifically using the word

* * * *

[Tr. 72] Resolution. What was that prepared for and what is it?

A. All right. The reason it was prepared is because we are quite frequently audited by insurance companies and reinsurers that want to make sure that we're handling asbestos claims in an efficient manner so that everything's proper under their insurance policies and coverage attaches. So it was prepared primarily to deal with insurance companies and reinsurers who frequently come in to audit us.

It basically just shows some of the benefits belonging to the Center for Claims Resolution.

Q. Mr. Fitzpatrick, I want to shift now to the period 1987 to 1992 in the tort system.

A. Yes, sir.

Q. When was the first time that you heard any consistent or frequent talk of the need for a global settlement to the asbestos crisis?

A. I think that as early as the year 1986, there began to be a widespread recognition that the asbestos litigation was spinning out of control and that a better solution needed to be derived.

Q. What were the factors that were brought to your attention or that you were aware of at that time that are subsumed in the phrase, "spinning out of control"?

A. Right. Prior to 1985 or so, new lawsuits had been filed at a relatively constant rate of about 500 per month or 6,000 [Tr. 73] per year and that had been true of not only '85, but 1984, '83, '82 and '81. I believe the backlog of asbestos cases had been in the 20,000 to 30,000 case range throughout that period with, you know, variations here or there, but that had roughly been the size of the problem.

Commencing in about 1986, the rate of new filings of asbestos claims accelerated dramatically so that instead of 500 claims a month being filed, approximately 2,000 claims a month started being filed and that held true throughout 1986, 1987, 1988, 1989, 1990 and indeed it holds true today. So by 1986, at least, there was a growing awareness that the backlog was growing and that the new filings were way up.

There had been studies done in the early '80s about transactional costs, how much went to lawyers in the asbestos litigation and there was a growing realization that the majority of the dollars being spent on asbestos were not in fact going anywhere near the victims but were instead going to the lawyers.

There were legions of examples of erratic verdicts in the tort system. Mesothelioma victims getting nothing. People with no impairment getting six and sometimes seven-figure verdicts.

So for a lot of reasons beginning in the mid-'80 period. Academics, think tanks, Congress and I think judges began to realize that the asbestos problem was something that [Tr. 74] was spinning out of control, to use my phraseology.

Q. Were there bankruptcies during this period of the '80s?

A. Sure. The original major bankruptcy occurred on August 26th, 1982 when the then called Johns-Manville Corporation filed for bankruptcy. Manville was frequently termed the General Motors of the asbestos industry, had supplied huge amount of the products and indeed had basically controlled the asbestos litigation until such time as it went bankrupt.

MR. BARON: Your Honor, I'm going to have to insert an objection on relevancy. We're judging this settlement. We're not judging what the history of asbestos has been.

MR. ALDOCK: If I might —

THE COURT: The objection's overruled.

THE WITNESS: Other bankruptcies in this early '80 period included a company called Unarco (ph), which was a fairly substantial defendant prior to the time that it went into bankruptcy.

There have been others but in the early to mid-'80s, I think Unarco and Manville are the ones that stick in my mind.

Q. Was the phenomena of what we call screening something that accelerated during this period?

A. Yes. And I probably should explain what screenings mean.

Q. Please.

A. Let me start out by saying screenings per se are not

* * * *

[Tr. 77] went to a meeting with the judiciary to discuss the asbestos crisis and the need for a global solution?

A. July 7, 1987.

Q. What meeting was that?

A. It was the first meeting on asbestos sponsored by the Federal Judicial Center. This particular meeting was held at the Sixth Circuit Court of Appeals courthouse in Cincinnati, Ohio. It involved judges from all over the country with significant asbestos dockets.

I was asked to come to this meeting and talk to the judges as were plaintiffs' attorneys, Mr. Levy from New York, Stan Levy and Mr. Robert Sweeney from Ohio. There may have been other plaintiffs' attorneys at this meeting, but those are the two I recall.

Q. What was the tenor of the discussion at that conference that you attended?

A. I think among the judges present, there were a lot of things discussed. The growing backlog was a concern of theirs. The fact that settlements were not keeping pace with new filings. The fact that transactional costs were — continued to eat up an enormous amount of the claims dollar, and the bankruptcies that had taken place were also a topic of discussion.

Q. Did you have a perception that the problems you described in your testimony earlier, were problems that others were [Tr. 78] experiencing in the same terms?

A. Oh, absolutely.

Q. As a follow-up to that meeting in Cincinnati, did you have occasion to discuss any of these concerns with anybody on the plaintiffs part?

A. Certainly. Immediately after attending this conference at the Sixth Circuit, I telephonically contacted Mr. Ron Motley. Mr. Motley having the largest number of asbestos cases in the country, his cases and all of his affiliates are counted, and having also had a leadership role in various national matters pertaining to asbestos on behalf of the victims, particularly the Manville trust bankruptcy at that point in time, was the logical person for me to approach.

Q. And share with us generally the tenor of those discussions?

A. Well, I think we discussed over the telephone several times the problems with the asbestos litigation as we perceived them, the comments the judges were making about the asbestos litigation.

What were potential ways to fix what looked to be a broken system, and I think we finally got to the point in August or September of 1987 where we actually began to exchange documents about a global solution to asbestos.

Q. From late '87 through '89, were you and the people you reported to really in a position to pursue these discussions

* * * *

[Tr. 82] courtroom and we have a problem putting things back together.

MR. ALDOCK: It had been my intention, your Honor, if it meets with your Honor's pleasure, to move all the exhibits identified by Mr. Fitzpatrick at the close of his testimony.

THE COURT: Fine. I don't know whether we had discussed that, I don't remember, but it's just a reminder.

BY MR. ALDOCK:

Q. Have you had a chance to look at Exhibit 203?

A. Yes, sir.

Q. What's that?

A. That is a June 20, 1990 letter from the Federal Judicial Center, signed by James Apple who was the director of the Federal Judicial Center, inviting certain individuals to an asbestos conference sponsored by the Federal Judicial Center in June of 1990.

Q. Roughly what was the size and complexion of the group that attended this conference?

A. I'm not sure of the size. It included several prominent plaintiffs lawyers, several academics, knowledgeable in this field, several defense representatives, and finally several of the major federal judges with asbestos caseloads, and I believe at lease one, if not two, state judges with an asbestos caseload.

Q. Did you and I attend that meeting? [Tr. 83]

A. We sure did.

Q. Well, what concerns were addressed there? What was discussed during that day session?

A. Well, it was largely a discussion of the same concerns that had been discussed at the 1987 conference, but they had magnified in severity in the three years that had past.

The transactional costs were still a major problem, the new filings rate had continued unabated, the unimpaired claimant problem had become even more severe because of the screenings. Backlogs had grown, the problem, you know, was approaching I believe 70 to 80,000 cases by the time of this 1990 conference, perhaps more.

Various contingent to be inconsistent, there continued to be what the judges felt were unnecessary repetitive trials of issues, unnecessary trials. So there was a whole plethora of issues discussed at this conference.

Q. Did some of the judges in the open sessions before there was a break-up between plaintiffs, defendants and judges, actually put out for discussions vehicles for addressing this problem?

A. There were a lot of things thrown out at this conference. Class actions were discussed, a national asbestos trial day was discussed, pleural registries, which I guess I haven't defined but will, were discussed, and I think there were a host of things that were discussed by the judges. [Tr. 84]

Q. Was there discussions of the judiciary's view of what the Bar should be doing about all this?

A. Yes. I mean, they basically told the plaintiffs attorneys present and the defendants present that they had better get together and solve this problem, that the problem was out of control, and that they expected a solution.

Q. What conclusion did you reach as you left that conference?

A. I viewed it as an enormously significant event in the history of the asbestos litigation. I don't think anybody who participated in that conference could have gone away from it feeling that business as usual was going to be acceptable in the minds of the judges. And that something creative had to happen and that was my impression walking away from that conference.

Q. What, if anything, did the CCR resolve to do to follow-up on that conference?

A. We decided to follow what basically we had been told to do, and that is to together with the plaintiffs bar and see if we could come up with a solution.

Q. What, if anything, did the asbestos judges begin to do following that conference, particularly some of the federal judges?

A. Right. They did a couple of things. For the first time the asbestos judges decided to organize themselves in a

* * * *

[Tr. 94] A. Yes.

Q. — 1990, what happened then?

A. Right. In September of 1990, Chief Justice Rehnquist appointed a panel to study the asbestos personal injury litigation. That panel's report came out in May of 1991. So that's what occurred in September of 1990.

In November of 1990, several asbestos federal judges with significant asbestos dockets wrote to the Judicial Panel for multi-district litigation and requested a transfer of the cases under the MDL panel rules.

Q. Would you look at Exhibit 206, Mr. Fitzpatrick, and is that the letter of the judges you've just described?

(Pause in proceedings.)

A. Yes. 206, Exhibit 206 is the letter to the Judicial Panel from the judges requesting that the panel take action.

Q. After those two events, the appointing, not the conclusion of the Rehnquist Committee, and the judges' letter in November to the

multi-district panel with regard to asbestos, what happened to the global settlement efforts between plaintiffs and defendants?

A. Well, I think at this time, which is the fall of 1990, the global settlement discussions which had been taking place which had been intense actually intensified even more because of these — some of these actions and heated up even more than they had been and they had not been in active

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[Tr. 99] A. Oh, okay.

Q. I also apologize for everyone. This is not the complete document. I only want to ask about one page. We will substitute the complete document in the record.

(Pause in proceedings.)

A. Yes, I have that in front of me.

Q. Page 7 of this order. What is — this is an order of Judge Weiner dated 9-17-91?

A. Yes, sir.

Q. Look at Page 7.

(Pause in proceedings.)

A. Yes, sir.

Q. Who was appointed by the Court as the co-lead counsel for the plaintiffs?

A. Oh, Judge Weiner appointed two co-lead counsel. He appointed Mr. Motley and Mr. Gene Locks as co-lead counsel of the plaintiffs, steering committee in connection with the MDL cases.

Q. Did Mr. Henderson have a role in this steering committee?

A. Yes, sir, he did.

Q. And just because he's a name who will appear again, did Mr. Hatton have a role on this list of people?

A. Yes, absolutely.

Q. On Page 9, I'll only ask one more question. When the defendants organized themselves, was the Center represented [Tr. 100] in the steering committee, in the negotiating committee?

A. Yes, sir.

Q. When we began to organize in this Court as plaintiffs and defendants with Judge Weiner and when he opened the proceedings early on, what was the message that you took away from those large plaintiff-defendant sessions?

A. Well, after the cases were transferred to Judge Weiner, I got the very clear message that he wanted us to solve the problem and to come to a global solution. He made it very clear about solving the problem. He didn't mean just the present cases, he wanted the problem solved which included both the present and the future cases. I don't think anybody could have drawn a contrary conclusion from the messages he gave us.

Q. As a result, did the plaintiffs and the defendants begin to get together again on an active basis?

A. Yes.

Q. And what were the discussions — what were the major issues that were being discussed at that point in time?

A. Yeah. I think the major sticking points in the discussions at that point in time involved the present pleural cases.

Q. And what was the fight over regarding the present pleural cases?

A. The plaintiffs Bar was opposed to any global settlement

* * * *

[Tr. 105] plaintiffs, Bar at those meetings was with respect to pleurals, what did you report?

MR. BARON: Well, can you limit that to time, Counsel. I will object because it's just too general a question.

THE COURT: I don't know the time at this point, either. If it's important, some time after MDL-875 was formed and after the first pretrial order, I don't know.

BY MR. ALDOCK:

Q. Roughly in the first year after the MDL?

A. I think we're talking the fall of 1991 here.

Q. And what did you report back was your view, having attended all these discussions of where the plaintiffs' Bar were on present pleurals and future pleurals?

A. The plaintiffs' Bar on present pleural cases, cases that had been filed up to that point in time, was insisting on a modest payment for such cases in the fall of 1991.

Q. Did they ever define modest? Did we ever get to numbers at that point?

A. No.

Q. All right. Then what was the position on futures?

A. The position of the plaintiffs' Bar on futures, future pleural cases, was that such cases would be deferred and would not receive immediate cash compensation.

Q. Until when?

[Tr. 106] (Pause in proceedings.)

A. Until such time as they actually got impaired from their asbestos exposure.

Q. And there was no agreement at that point in time on what that definition was or where that medical line would be drawn, is that right?

A. All right. The medical issues were not resolved at that point in time in 1991.

THE COURT: Mr. Aldock, I believe I understand it, but the record certainly doesn't have a definition of what present pleural cases are or what a pleural case is. I'm confident I know what it is but the record doesn't have it in there. I don't know what —

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, can you — can you fix that for the record? What is the — by present cases we meant what?

A. Yeah. A present case is a case that has been filed at the point in time that you define present.

Q. Right. And a pleural is what?

A. A pleural case is a case in which the claimant shows signs of asbestos exposure, pleural plaques on his lungs but has no impairment from his exposure to asbestos.

Q. And when we talk about a future pleural, what do we mean in this context?

A. A future pleural is again a claimant who only has signs [Tr. 107] of asbestos exposure but no impairment from that exposure but his claim has not been filed at the point in time that you define future claim. It is something to be filed in the future.

THE COURT: When you talk about impairment, you talk about physical impairment?

THE WITNESS: I think that's right, your Honor. I mean a plaque is —

THE COURT: Functional impairment —

THE WITNESS: Right.

THE COURT: — or lack of volume in the lungs? What are you talking about?

THE WITNESS: I think a plaque had been described as merely a freckle on the lung.

MR. BARON: Your Honor, we object to that very strenuously. He doesn't have the qualifications to give a medical opinion.

THE COURT: We want to know what the conversations were about, that's all we're talking about. Not defining some medical condition forever and ever as a scientific matter. We're talking about defining terms for purposes of discussions that were going on. So we don't need — I thought his answer was not responsive, but, so I don't — we've all listened to —

MR. ALDOCK: Is it fair —

* * * *

[Tr. 114] MR. ALDOCK: — that you wanted to have Mr. Motley follow me, that's okay.

THE COURT: Let's get yours finished, and we'll see where we go from there.

MR. ALDOCK: Thank you, your Honor.

THE COURT: You're still on direct, Mr. Fitzpatrick, you're under oath. Please proceed, Mr. Aldock.

LAWRENCE FITZPATRICK, Resumed.

DIRECT EXAMINATION (Continued)

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, I want to pick back up with the negotiations between groups of plaintiffs and groups of defendants lawyers, plaintiffs lawyers and defendants lawyers in late 1991.

Did there come a point in those negotiations in late 1991 where they basically came to a head?

A. Yes. In late 1991, the defense group, the large defense group did make an offer to the group of plaintiffs attorneys. That offer was rejected for a couple of grounds. The offer had contemplated —

MR. BARON: Your Honor, the answer is not being responsive to the question, and I don't think there is a pending — I think he's answered the pending question, and he's just now giving a speech and —

THE COURT: I think the answer technically might [Tr. 115] have been a yes or no.

MR. BARON: Yes.

THE COURT: And once he did say yes, they did come to a head, maybe you ought —

MR. ALDOCK: Okay. Would you describe —

THE COURT: — to ask another question.

BY MR. ALDOCK:

Q. Would you describe, Mr. Fitzpatrick, in general terms what the defense offer was, and in general terms what the plaintiffs response was?

A. In general terms, the defendants in the group had made a settlement offer. It was basically based on their traditional, historical averages in the tort system. That offer was rejected for basically two reasons.

Number one, it contemplated giving the plaintiffs group a large pot of money, and we were informed by the plaintiffs attorneys that they would have difficulty in determining how to divide up that pot of money.

The second reason stated for the rejection was that plaintiffs attorneys wanted to negotiate their own present cases, and would not give up control of those present cases to any other attorney.

Q. The offer that was made by the defendants was for both present and future?

A. That's correct.

[Tr. 116] Q. Cases?

A. Yes.

MR. BARON: Your Honor, again I'm going to ask him not to lead the —

THE COURT: Sustained. Try not to.

MR. BARON: Thank you.

MR. ALDOCK: They also don't want a yes or no answer. It makes it tricky, but we'll continue to do it this way.

MR. BARON: Well, it's not the answer I've got the problem, it's the question.

THE COURT: Sit down, Mr. Baron. The ruling has been made, don't talk among yourselves.

MR. BARON: Thank you.

THE COURT: Get on with it, Mr. Aldock.

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, the — what was in your mind meant by the idea that with regard to presence, we would negotiate with every plaintiffs lawyer separately? What did they mean by that? How was it going to work?

A. It meant that the defendants would have to go to each and every plaintiffs firm in the United States, and separately negotiate their present claims.

Q. And what was the defendants response to that?

A. The defendants as a group felt that approach was not [Tr. 117] practical or doable.

Q. When was this that the breakdown of those negotiations occurred?

A. It would have been in late 1991, I think November of 1991.

Q. How did the CCR respond to that breakdown of negotiations?

A. We decided that we wanted to pursue individual global settlement negotiations on behalf of the CCR after the failure of the large group negotiations.

Q. Why did we come to that view?

A. We felt that a global solution was desirable. We had participated in good faith in the larger group discussions. When they failed, we decided to go individually.

Q. How did we implement that desire?

A. We decided to approach Mr. Motley and Mr. Locks who were the co-chairpersons of the plaintiffs, MDL steering committee, and who had played prominent roles in various national matters for asbestos victims to attempt to negotiate a settlement with them.

Q. Why did we approach Mr. Motley?

A. We approached Mr. Motley because he was one of the co-chairpersons of the MDL steering committee. He had played a prominent role in the Manville bankruptcy and many other bankruptcy proceedings. Had been active in Congress, and [Tr. 118] represented some unions.

Q. Why did we approach Mr. Locks?

A. We approached Mr. Locks because he was the — one of the co-chairpersons of the plaintiffs MDL steering committee. Also had been prominent in national matters on behalf of asbestos victims, such as the Manville bankruptcy, the Unarco bankruptcy was actually the chairman of the Unarco entity that emerged from the bankruptcy, and brought something of a different perspective to the table than Mr. Motley did.

Q. Prior to this time in approaching these people in late 1991, had Ness, Motley and Greitzer and Locks been traditional allies in the

tort system in approaches to the national issues that had been the tort system?

MR. BARON: Your Honor, leading. Can we get a question that's not leading. I object —

THE COURT: Counsel, don't — I didn't tell you this. Don't argue any objection unless I ask you to.

MR. BARON: All right. Leading, your Honor.

THE COURT: If the objection is it's leading, objection sustained.

MR. BARON: Thank you.

THE COURT: The next rule of this Court is you don't thank me for making a ruling at any time, please. That applies to all counsel.

BY MR. ALDOCK:

* * * *

[Tr. 121] A. Primarily because we are only one of a number of defendants in the typical asbestos case, and plaintiffs attorneys just didn't want to fool around, if you will, with a center green card if they had to try their case against other defendants.

Q. Was there any other reason why it was not successful in your view?

A. Yes. Many plaintiffs attorneys were concerned about what would happen if they entered into a green card. Their claimant — their client rather became sick some years into the future, and the defendant granting the green card had become insolvent in the interim period. So the lack of funding for green cards was an additional reason that program was not terribly successful.

Q. Did a green card offer the claimant any particular sum or procedure for disposing of his claim when he had one?

A. No, not typically.

Q. Did the center ever explore a concept, the center and the Asbestos Claims Facility before it, ever explore a concept known in discussions as a funded green card?

A. We explored something similar to that.

Q. And what does that mean to you, and what did we explore?

A. During the days of the Asbestos Claims Facility and the center, we tried to explore the idea of insurance, cancer insurance for claimants who are today unimpaired, but may [Tr. 122] contract cancer or some other type of impairment in the future.

Q. And what was the result of that exploration?

A. We were never able to find an insurance carrier willing to write that sort of coverage at a premium that was reasonable or practical.

Q. Could you expand on why they told you they couldn't do it, or why it would cost what it would cost?

A. I don't think — I can't expand. The response back was that it wasn't practical at any sort of affordable premium.

Q. How did you measure what was an affordable premium? What was the standard that you would measure whether it was affordable or not compared to the tort system or otherwise?

A. Well, I think one has to look at the level of benefits that the carrier might be offering at the price. And when we looked at the sorts of proposals that we saw, there weren't many of them, they were for extremely low benefit levels at an extremely high cost.

Q. How did that cost compare with the cost of settling the claim in the tort system for a full release?

A. Yes. Let me back up. I don't think we ever got to the point of getting cost information when we did the facility investigation. We did see some cost information during the center days when we did the investigation, but the premium for the kind of insurance that was under discussion, was [Tr. 123] actually larger than it cost us to settle the unimpaired claim in the tort system, and get a full release.

Q. What, Mr. Fitzpatrick, is a pleural registry?

A. A pleural registry is very similar to a green card. It is an agreement to waive the statute of limitations in the case of an unimpaired claimant, and that claimant has the right to compensation if and when he or she ever does become impaired by asbestos exposure.

The major difference between a pleural registry and a green card, is that the pleural registry is enacted by an order of a court in a given jurisdiction, and therefore applies to all asbestos defendants in that jurisdiction, as opposed to green cards which are typically one-on-one contractual agreements between claimants and individual defendants.

Q. Were the efforts that the center made to explore the pleural registry concept and have them implemented around the country successful?

A. They enjoyed some degree of success, but they were not as successful as we would have liked.

Q. And why is that? Why do you think they were not as successful as you would have hoped?

A. Because there was opposition in many quarters from the plaintiffs attorneys to such pleural registries.

Q. And what was the opposition's argument? Why did they [Tr. 124] not want it?

A. Well, I think some of them wanted immediate cash compensation for their clients be they impaired or not. Others were more concerned about the lack of funding in the event their claimant went on a registry, became impaired years down the pike, and then found that the defendants whose products their client had been exposed to, had gone bankrupt in the interim.

Q. Was there any concern that they were local and not national?

A. Yes, that was another problem. Unless there was a national pleural registry, one could simply go to an adjoining state, if one wanted to and file the claim and avoid the pleural registry.

Q. Have we had — what is the extent of the experience we've had in the tort system, we the center, with green cards and registries over the last few years?

A. We have done some green card dispositions. Some cases had been put on pleural registries. I honestly don't know of the exact numbers. We've had some success, but it certainly hasn't been overwhelming.

Q. Has the — what's the timing of the green cards, and what's the order of magnitude roughly of numbers in terms of issued green cards over time?

A. I didn't understand the first part of your question?

[Tr. 125] Q. How many green cards do you think our companies have out there and roughly over what period of time?

A. I'm not sure, a few thousand probably in the few years that we gave green cards. It's not a great sum.

Q. And with respect to registries, are they a phenomena of the last few years or do they go back a long ways?

A. They go back to 198 — early 1986.

Q. And which registry was that?

A. The Massachusetts — the pleural registry in the Massachusetts Federal Court, I believe was the first pleural registry enacted.

Q. And of the registries that have been enacted, how many of them are within the last few years?

(Pause in proceedings.)

A. About half.

Q. And how many are there?

A. I'm not sure. i [sic] think they're somewhere between 12 and 17. I don't know the exact number. It's more than 10, but less than 20.

Q. Court by court or jurisdiction by jurisdiction in terms of state? How are they done?

A. They are generally done jurisdiction by jurisdiction.

Q. Are they state court or are they federal court or are they both? How are they done?

[Tr. 126] A. Ideally for a defense standpoint, you want them in both the federal and state court in a jurisdiction. Otherwise, one can just go to the federal court or the state court if one wants to avoid it. I think it's a mixed bag. Some jurisdictions have both federal and state court registries. Others have registries that are only federal in nature and some have registries that are only state court in nature.

Q. Has the — has the CCR ever done any particular studies of progression of disease and how many people progress from asbestosis to cancer or green cards, pleurals to cancers? Has CCR ever done any studies of any kind in that area?

A. No. We have never done any formal studies. We do, of course, have our own experiences in the center as having granted green cards and add pleural registry cases and has seen what has happened to those cases.

I would characterize that as a formal study.

Q. Would you characterize that as a modest or extensive experience with regard to that, given the numbers you've talked about earlier?

A. Well, it's obviously modest. We haven't given — we haven't disposed of many cases through those mechanisms and not many years have elapsed since we granted those kinds of dispositions, so that for diseases, like asbestos diseases that have latency periods of 20, 30 or 40 years, I don't think we can draw any sort of rational conclusions based on [Tr. 127] the limited data and number of years that we've done those kinds of dispositions.

Q. What's the difference between a limited release, Mr. Fitzpatrick, and a full release in the litigation?

A. Right. May I start with the full release?

Q. Sure.

Q. A full release is a release of all claims in exchange for some sort of consideration, usually monetary.

A limited release in contrast, typically only releases the disease that the victim is suffering from at the time the release is entered into. For example, a claimant with asbestosis occasionally does a limited release that releases his asbestosis claim in exchange for a sum of money, but allows him to come back in the event he gets lung cancer or mesothelioma.

Q. Which kind of release does the CCR generally provides in the tort system?

A. In the tort system, 90 percent —

Q. While in the — yes, go ahead.

A. I'm sorry. Are we talking the tort system or the Georgine settlement?

A. In the tort system.

Q. All right. In the tort system, since we've been in operation, we've attained approximately 90 percent of our releases have been full releases.

* * * *

CROSS EXAMINATION

[Tr. 90] article, "Should a malignancy subsequently develop, the claimant would then be allowed to present another claim." That was the intention of the limited release program that you intended to get underway, right?

A. As a long-term goal, yes, sir.

Q. Okay. Now, why was it that you wanted to set up green card programs, pleural registries, limited releases? What was the purpose for that? When I say you, I mean CCR?

A. Yeah, I understand that. I think in my own view, the pleural cases have faced what Mr. Motley called the Hopson's choice in his opening statement yesterday.

If they're told they have any sort of lung changes, they often must file a lawsuit or risk being barred by the statute of limitations.

Many times their claim comes up for resolution before they have developed any kind significant degree of impairment and they end up compromising their claim fora very small or a nominal amount. In many cases that precludes them from receiving additional compensation if and when they ever do really become sick from asbestos exposure.

So we've always struggled for a better way to handle the pleural claims and it's my opinion, and I realize other people differ with me on this, that green cards and pleural registry programs are a better way of dealing with the pleural claim problem.

* * * *

[Tr. 104] A. Yes.

Q. But you'll get it, won't you?

A. No —

MR. ALDOCK: Objection, there's nothing about Georgine that defines it as a green card.

THE COURT: Technically that's correct. If you want to characterize it differently, Mr. Baron, you may.

Sustained.

BY MR. BARON:

Q. Well, deferral would be another word to use.

A. No, sir.

Q. You're not a small part of the universe?

A. We are still a small part of the universe.

Q. Under Georgine, for people who have unimpaired pleural cases, there's a deferral, is there not?

A. There is a package of benefits, not a deferral.

Q. Well, what are the package of benefits if they're not a deferral?

A. In addition to being deferred, they get a package of benefits that the people who get green cards and pleural registries did not get.

Q. Okay. Well, let's see if we can draw a diagram to calculate that one.

A. All right.

MR. BARON: If I might stay here for a moment, your [Tr. 105] Honor, maybe we can fill in the blanks.

THE COURT: Sure.

BY MR. BARON:

Q. What does someone who does a green card with CCR get?

A. He gets a deferral.

Q. Okay. And describe for me what do you mean by deferral?

A. His case is put — the statute of limitations is waived, and his case is put in an inactive status until such time, if ever, that he develops impairment.

Q. Okay. So he doesn't have to worry about the statute of limitations?

A. Correct.

Q. Doesn't have to worry about development of another disease, having had a release for it because he can wait until he gets the other disease? In other words, a person who goes — who gets a green card, doesn't have to worry about compromising his or her claim for a small sum of money and signing a release. If that person develops a more serious injury, they can file a claim for the more serious injury, correct?

A. If they develop asbestosis, they can file a claim for asbestosis.

Q. Or if they develop lung cancer they can file a claim for lung cancer, or if they develop mesothelioma, they can file a claim for mesothelioma, can they not?

* * * *

[Tr. 116] Q. All right.

A. The additional — all right, I'll-stand by my answer for now.

Q. All right. What other package of benefits do claimants get under Georgine that are deferred?

THE COURT: Get near your microphone, please, Mr. Baron.

MR. BARON: Oh, I'm sorry.

BY MR. BARON:

Q. What other package of benefits do claimants get that are given to them under the deferral in Georgine?

A. I think there are basically three in nature. Number one, unlike your bucks in the item under green card, the deferred claimants under Georgine get real bucks when and if they become impaired. They don't get a theoretical right to sue, they get a sum certain based on our historical averages.

Q. Okay. Number two?

A. Number two, they get a guarantee that there will be someone there to pay those real bucks.

Q. Okay.

A. And number three, unlike your example, the people in the Georgine settlement who become impaired let's say due to asbestosis, and then subsequently contract a malignancy, have the

right to come back and seek compensation for the second disease, whereas in green cards and pleural registries [Tr. 117] and most jurisdictions if you come off, you only get one bite of the apple. So those are the three major benefits I think the Georgine claimants get that they are not given by pleural registries and green cards.

Q. All right. Well, let's talk about these benefits now.

An individual who in the tort system has a nonqualifying case, a pleural claim.

A. Right.

Q. And let's say that he lives in a state like what, New Jersey, that permits him to come for additional injuries. It's a second and third injury state, is it not?

A. I believe that's right.

THE COURT: You mean by their law or statutes?

MR. BARON: By their law and statute.

BY MR. BARON:

Q. Let's say we've got an individual who resides in New Jersey, and let's say that individual has a pleural claim that does not qualify under Georgine, let's look at what his options are.

Option number one is, he can prosecute the case and he can receive whatever money that he — that either the jury gives him, or he's willing to settle for, correct?

A. What time — I'm getting

Q. Today. January 15th, 1993.

A. Back up. Who is this claim brought against?

* * * *

[Tr. 132] A. I would.

Q. And then in 1990, the number of claims that were settled were 14,824, right?

A. Correct.

Q. And in 1991, the number of claims that were settled were 15,843, right?

A. Right.

Q. And in 1992, the number of claims that were settled were 25,354, right?

A. Right.

Q. And in 1993, you settled 52,136 claims during that calendar year, correct?

A. Correct.

Q. And that's a total of 128,164, which averages over a five-year period to 25,632 claims or thereabouts, would you agree with me?

A. I would agree that they — I haven't done the math. I would agree that if you divide 128, [sic] 164 by five that it may equal 25,632.

Q. Now, of the 119,400 claims that were filed, I believe it was your testimony that 196 had actually gone to verdict, is that right, over that five-year period?

A. No, that's a misstatement.

Q. All right. Well, why don't you correct it for me?

A. 196 cases went to verdict between the time of inception [Tr. 133] on January 15th, 1993. Okay. Some of these cases would not have even been filed by January 15th, 1993. Some of those trials probably involved cases that we had when we started up —

Q. Okay.

A. — prior to 1989.

Q. All right. So how many cases would we be talking about? We take off 1993 which is about 21,000 cases, and we add back in the cases that had been left over — that had been pending in 1988, correct?

A. Sure.

Q. And there were more cases pending in 1988 than 21,000, were there not?

A. Again Center members?

Q. Excuse me?

A. Again CCR members?

Q. Yes.

A. Yes, there were.

Q. So the number of actual cases that we measure the 196 against is probably much higher than 120,000 cases?

MR. ALDOCK: I object to the characterization of what we measure against. That's Mr. Baron's characterization.

MR. BARON: Well, what I am measuring it against.

THE COURT: The question is modified. Overruled.

[Tr. 134] THE WITNESS: You are measuring —

BY MR. BARON:

Q. Do you follow me?

A. No. I don't see what you are measuring.

Q. I'm trying to determine how many cases get tried versus how many cases get filed against CCR members?

A. Right, and I don't think you can do it from this chart because of the problem of timing. But, you know, I would say historically we have not tried a high percentage of the cases that are filed, that's for sure.

Q. Well, one percent of 120,000 claims would be 1,200 claims, would it not?

A. That's the math.

Q. Now, do you believe that CCR has tried 1,200 claims?

A. To verdict?

Q. Yeah.

A. No, I do not believe that.

Q. Substantially less than that, is it not?

A. Sure.

Q. So would you now agree with me that better than 99 percent of all cases that get filed against CCR do not go to verdict?

A. Do not go to verdict, yes, I would agree with that.

Q. Okay. Now, of the cases that get filed that do not go to verdict, they are disposed of in three ways, are they not?

* * * *

[Tr. 144] A. Yes, that's correct.

Q. Now, when you settle a claim, you lower the transaction cost, do you not, when you settle it quickly?

A. Generally speaking, that is correct.

Q. All right. You did that for a short period of time and then you changed your philosophy about settlement, did you not, and when I say you, I mean CCR?

A. Yeah. After the first two years of our existence, we changed our philosophy.

Q. And you changed your philosophy because you knew there were a lot more claims that were continuing to come in, correct?

A. We changed our philosophy because after having settled thousands of cases in the first two years of our existence, deemed by far the most liberal asbestos settlers in the United States of America, we found at the end of the two-year period that because of the new filings the backlog had actually grown against our membership, so — and I think not surprisingly at that point in time, we decided to rethink our settlement strategy.

Q. Well, if you had the same settlement strategy in 1990, '91, '92 and '93, as you did in '89, you would have settled about the same number of claims you received each year, would you not?

A. I don't know that I can answer that question. If we had [Tr. 145] it — what was the question again?

Q. Well, you settled about as many claims in 1989 as got filed against you, correct?

A. That's correct.

Q. And if you had done that in each of the next four years, you would have had just an even balance, would you not?

A. Yes. In the math, 20,000 equals 20,000.

Q. Right. But you made — you and CCR made the decision not to do that anymore.

A. I have said we decided to rethink our settlement strategy after being a very liberal settlement vehicle for two years.

Q. The number of claims that you received from 1988 through 1993 with peaks and valleys has remained essentially flat, has it not?

A. Yes. New filings have remained relatively constant.

Q. Okay. And if you would have settled the same number of claims each year, your inventory would be zero?

A. No, our inventory would have been what it was when we started the CCR.

Q. Right. But you would not have gained on the inventory?

A. We would not have gained or we would not have lost if we settled exactly the number of cases that came in. I think that's self-evident.

Q. I think it's very self-evident, Mr. Fitzpatrick. But you made the decision, you, CCR, made the decision not to do that [Tr. 146] anymore?

MR. ALDOCK: Objection, your Honor. Asked and answered twice.

THE COURT: Sustained. That's not his answer either. His answer was they changed their philosophy to something. I don't know what it is yet.

MR. BARON: Right.

THE COURT: Unless he said it earlier and I forgot.

MR. BARON: All right.

BY MR. BARON:

Q. The philosophy was what, Mr. Fitzpatrick, after it changed in 1990 or so?

A. Right. After we changed our philosophy, we determined in the third year of our life and in the fourth year to not do large blocks of inventory settlements with plaintiffs, attorneys unless we could get protection — not protection — pleural registries in the jurisdictions where those attorneys were practicing for future unimpaired claims.

Q. Well, in your deposition, you said protection against future claims.

A. Yes.

Q. Do you recall that?

A. I would view pleural registries as a protection.

Q. Protection for who?

A. Protection for the CCR companies and I think one could [Tr. 147] take the view protection for the unimpaired claimants, too.

Q. Well, something happened in about 1991 that changed things dramatically as far as CCR was concerned, the MDL process, correct?

A. The MDL process occurred in 1991, yes.

Q. Right. When you said previously — and I should have had you explain this — when you said previously that CCR made the decision not to do inventory settlements, what is an inventory settlement? Can you describe that for the Court?

A. Yes. I think an inventory settlement is an agreement with a plaintiff's attorney who practices in the asbestos personal injury area to settle all of these pending cases and cases ready to be filed in exchange for monetary consideration.

Q. As opposed to what other type of settlement?

A. Well, there can be trial calendar driven settlements which are just the settlement of cases that are scheduled for trial. There can be a small block settlement in which you settle a group of cases involving claimants represented by a given attorney and I think there are other permutations and commutations but those are some of the kinds of settlements that there are.

Q. Well, would it be fair to say that in the second half of 1990 is I think when you developed the strategy, if a plaintiff's lawyer could not get his cases up for trial, the likelihood is he wouldn't be able to settle with CCR in 1990?

[Tr. 148] A. 1991.

Q. '91.

A. In 1991, I think it's by and large correct. It's not totally correct. We didn't just do trial calendar settlements but by and large its correct.

Q. Unless the plaintiff's lawyer would agree to a pleural registry?

A. Yes.

Q. And the pleural registry provided protection for CCR against those claims?

A. It provided protection for the CCR members against future unimpaired claims and I believe provided protections for those claimants themselves.

Q. But the bottom line is the plaintiffs' lawyers were not recommending it for their clients so you couldn't get it done voluntarily very often, could you?

A. Not in many jurisdictions, that's correct.

Q. Well, did it reach the point in 1991 or certainly towards the end of 1991 that the only cases that were getting settled in the United States for the plaintiffs' Bar were those cases that were up for trial in jurisdictions where the docket was moving or those cases where the plaintiff's lawyer would agree to a pleural registry?

A. I don't think it ever got quite to that point. We continued to do some settlements that weren't strictly [Tr. 149] speaking trial calendar driven. We certainly were doing fewer of those kinds of settlements than we did during our first two years of operation.

Q. And you decided this was the way to go, did you not?

MR. ALDOCK: Objection.

Q. As CEO of CCR?

THE COURT: The question is did you personally individually and in a professional capacity as CEO make that decision yourself.

THE WITNESS: I did not personally make that decision.

BY MR. BARON:

Q. Who made the decision?

A. It was a decision by the CCR board of directors of which I am a member.

Q. All right. Now, in furtherance of this belief that pleural registries would provide protection for CCR, did CCR authorize and pay for the writing of Law Review articles?

A. The CCR did authorize and pay for a Law Review article on — and suggested that the topic be pleural registries, that's correct.

Q. All right. If you would, turn to Exhibit Number 54 in the book, please, Objectors, Exhibit Number 54.

A. Volume 1 or Volume 2?

Q. That would be in Volume 2.

* * * *

[Tr. 183] started believing that you were going to be able to do a deal for those future claims, right?

A. We became relatively confident in May or June of 1992 that the discussions would be successful, yes, sir.

Q. Okay. Now, was there a give and a take during these negotiations for the future claimants?

MR. ALDOCK: I object, your Honor. The witness wasn't present. He probably assumes what was going on.

MR. BARON: Well, I'm certain that it was reported back to him.

THE COURT: The objection is sustained. This man did not participate directly in the negotiations. You'll have to find out what he knew —

BY MR. BARON:

Q. Was it reported back to you that there was give and take between the parties to this negotiation during the summer of 1992?

A. I don't recall the summer of 1992. It certainly was reported back to the Center board from time-to-time that there were — these were hotly contested negotiations. I just can't speak for that window of time.

Q. Okay.

A. The early summer of 1992.

Q. And when you say hotly contested, what do you mean?

A. There were a number of outstanding issues and the parties [Tr. 184] were bargaining over those outstanding issues.

Q. And the two law firms were purporting to bargain for the future claims as you understood it?

MR. MOTLEY: Your Honor, I object again unless he makes it time specific. The witness has already said we weren't involved in this during the trial in Baltimore.

THE COURT: Sustained. Ask another question.

BY MR. BARON:

Q. During this period of time that you've just described where there were hot negotiations going on, and there was give and take between the parties, was that in 1992?

A. The negotiations did take place in 1992, but I know there was a period of time, for example, that the Ness, Motley firm did not participate in the negotiations because of the Baltimore trial.

Q. But during 1992 you believed that these two law firms were giving and taking on behalf of the future claimants?

MR. MOTLEY: Your Honor, I hate to -

THE COURT: Sustained for the same reasons as Mr. Motley pointed out before. The time problem is concerning me.

MR. BARON: All right.

BY MR. BARON:

Q. When can you remember any give and take as you've described it, at what point in time?

[Tr. 185] MR. FITZPATRICK: Objection, he doesn't remember give and take. You can ask him if he was advised, he wasn't there.

THE COURT: He called the term hotly contested. He didn't accept your term of give and take. He called it hotly contested.

MR. BARON: All right.

BY MR. BARON:

Q. What period of time did you believe the negotiations were hotly contested?

A. From the time they began until the time they finished is my understanding —

Q. Okay.

A. — based on the reports I received.

Q. All right. Good.

In order to be hotly contested, does that mean that the two sides are battling with each other?

A. Battling in what sense, physically?

Q. What do you mean by hotly contested, Mr. Fitzpatrick?

A. That they were difficult negotiations that were going on.

Q. Okay.

A. People had differences of opinion. How much clearer can I be?

Q. Well, the bottom line though is while those hotly contested negotiations were going on, CCR and you believed [Tr. 186] that Mr. Motley's firm and Mr. Rice's firm were negotiating on behalf of future claimants, correct?

MR. ALDOCK: Objection, it's an argument, no time frame, and has all the problems with everything else that's been going on.

THE WITNESS: I thought Mr. Motley and Mr. Rice were in the same firm?

BY MR. BARON:

Q. I mean Mr. Motley, Mr. Rice and Mr. Locks were negotiating hotly on behalf of future claimants?

MR. FITZPATRICK: Excuse me, Judge. I just don't understand why Mr. Baron doesn't understand that we have a time difference problem here, and he's been told this four times.

THE COURT: Well, I assume the question is whenever these negotiations took place.

MR. BARON: Exactly.

MR. MOTLEY: Well, if the record is clear, Mr. Baron is —

MR. BARON: Whenever.

MR. MOTLEY: Whenever.

MR. BARON: Whenever.

MR. MOTLEY: Whenever.

BY MR. BARON:

Q. Whenever these negotiations were going on, you believed [Tr. 187] that these lawyers were representing future claimants, correct?

A. I believed the discussions involved future claims, and when they were going on, they reported back to me and to the facility board as difficult contested negotiations.

Q. Let's try it again, listen carefully.

THE COURT: Mr. Baron, you're not going to ask the same question again.

MR. ALDOCK: I'm going to object to him trying it again.

THE COURT: He does not accept your phraseology that these law firms were representing future claims. You've asked it about four times and his response has consistently been future claims were part of the discussions, et cetera, et cetera.

So he's not going to accept your exact language, so move on to something else, please.

BY MR. BARON:

Q. Mr. Fitzpatrick, if you want to buy a piece of property, is it your usual practice to talk to the owner or the owner's agent?

A. I haven't bought that much property in my day, Mr. Baron. Okay.

A. I usually go through a real estate agent who gets a six percent commission.

* * * *

[Tr. 191] A. No, it isn't.

MR. BARON: Excuse me, your Honor. Is there an objection, there is a chorus —

THE COURT: I don't know, but I wish counsel would not be a Greek chorus. Be quiet, please. If you want to object, one lawyer will object and not instruct the witness. And please don't make arguments I don't ask for. I sometimes get sloppy and don't chew you out for it, but I don't need the argument unless I ask for it.

BY MR. BARON:

Q. Mr. Fitzpatrick, maybe we can make this easier. Let me refer to volume two of your deposition where I ask you similar questions, Page 259, Line 5.

A. I need a moment, Mr. Baron.

Q. Volume two of your deposition. It was done last week.

A. I know, I just need Page 259. I'm at Page 259 and —

THE COURT: What line?

BY MR. BARON:

Q. Line 5, we'll begin there. Your answer to a question that I had was, "I think I testified previously that in 1991 we had resolved not to settle large blocks of present inventories of asbestos claims absent some commitment to the future. In 1991 and 1992 the commitments that we sought for the future were largely pleural registry programs in various jurisdictions and we determined we wouldn't settle large [Tr. 192] blocks of inventory of present claims without pleural registries in jurisdictions."

Was that the position of CCR?

A. Absolutely.

Q. And did you make that very clear to class counsel?

A. I did —

Q. CCR make that very clear to class counsel?

A. I'm not sure if that position was made crystal clear to class counsel because I wasn't in those discussions.

Q. Now, the position changed again in '92, did it not?

A. Yes. There became a point in time in 1992 when we became reasonably confident that the Georgine negotiations would become successful. We then changed our position from not doing inventory settlements without pleural registries, to doing inventory settlements in exchange for commitments on the future.

Q. Okay. In exchange for commitments on futures.

And what were the commitments for futures that was the in exchange for?

A. We would agree after we became relatively confident that the Georgine negotiations would be successful to do inventory settlement of present cases if the attorneys we were dealing with would in effect agree to recommend to their future clients that lawsuits not be brought unless they had a reached a certain line of impairment or a certain degree of [Tr. 193] impairment.

Q. And did you make that very clear, and I say you, CCR, to Ness Motley to Greitzer and Locks?

A. Again, I wasn't in those particular discussions, so I —

Q. Was it reported to you that was made very clear?

A. I don't recall whether or not it was reported to me.

Q. And is that what led to the $215 million worth of settlements with those two firms, the commitment that they would agree to that?

A. Agree to what, sir?

Q. Agree to the limitation that you just described, the commitment?

A. We did inventory settlements with a number of plaintiffs firms who would agree to give us the commitment they would recommend to their future clients not to bring suits unless they had reached a certain line of impairment.

Those inventory settlements included settlements with the firm of Ness, Motley, Ness Motley's affiliates, Greitzer and Locks, and many other firms who are not affiliated with either Ness, Motley or Greitzer and Locks.

Q. Mr. Fitzpatrick, but for Greitzer and Locks and Ness, Motley giving you, CCR, those commitments for the futures, you would not have settled the $215 million worth of present claims with those two firms, correct?

A. Without a degree of confidence that the Georgine [Tr. 194] discussions would be successful, we would not have done the present inventory settlements with Ness, Motley, with Greitzer and Locks, or the other numerous unaffiliated plaintiffs firms we did inventory deals with, that is correct.

MR. BARON: Thank you. Pass the witness.

THE COURT: Any other people that have — objectors that have unique areas to cover?

MR. HENDERSON: Yes, your Honor.

THE COURT: Do you have any understanding among yourselves as to go next?

MR. ROSENBERG: It doesn't matter, as long as we understand that we can each go.

MR. BARON: Your Honor, for the record —

THE COURT: Get near a microphone please.

MR. BARON: On Page 136 of the transcript from yesterday, the direct examination of Mr. Fitzpatrick —

THE COURT: Do you have a line number?

MR. BARON: Yes, it begins — the question begins at Line 20.

THE COURT: Just read it in the record please.

MR. BARON: "Question: What is the futures' agreement with the law firm, Mr. Fitzpatrick?

"Answer: I define a futures' agreement with a plaintiffs' law firm to be an agreement to settle that firm's

* * * *

TESTIMONY OF AMBROSE VOGT

* * * *

[Tr. 144] Q. Would you state your address for the record?

A. 1206 Homewood Drive (ph), Pasadena, Maryland.

Q. Where is your home of Pasadena, Maryland located?

A. Approximately 12 miles south of Baltimore City.

Q. How old are you, sir?

A. 42.

Q. How far did you go to school?

A. I finished two years of college.

Q. Mr. Vogt, what is your occupation?

A. I'm an asbestos worker, insulator.

Q. How long have you been an asbestos worker, insulator?

A. Approximately 22 years.

Q. Are you a member of a union?

A. Yes, sir.

Q. Which one?

A. The International Association of Heat and Frost Insulators and Asbestos Workers.

Q. Have you been exposed to asbestos, sir?

A. Yes.

Q. When and how were you first exposed to asbestos or asbestos containing materials?

A. To my knowledge, the first time was in the Spring of 1965. I worked with my father on a job for approximately two days mixing asbestos cement.

[Tr. 145] Q. What was your father's occupation at that time?

A. He was an insulator, also.

Q. When and how did you first learn, Mr. Vogt, that asbestos could be harmful to your health?

A. I would probably say in the early '70s, just from talking to the other members of my local and people on the jobs and different publications.

Q. Have you ever been diagnosed yourself with any asbestos related disease?

A. No, sir.

Q. Do you think that you might get sick in the future as a result of your asbestos exposure?

MR. RICE: Objection.

THE WITNESS: It's very possible.

THE COURT: Overruled. It's not being offered for the truth of it. We don't know scientifically whether he will or won't but it's an issue in the case. I'll hear it.

BY MR. NOLAN:

Q. You said sir, it was very possible. Are you concerned about that?

A. Yes, I am.

Q. And why?

A. Well because in the last 20 years I've seen an awful lot of members of my local get sick and die from asbestos related diseases, and it's something anybody in my position, I think [Tr. 146] would be worried about.

Q. How did you first become involved in class action lawsuit?

A. Well in January — the week of January 10 of 1993, or possibly the week before, my superintendent, Donald Christy (ph) and you and Mr. Locks represented in an asbestos case, asked me if I'd be interested in finding some out details of a class action suit that was being filed. And he —

Q. And why were you — go ahead, sir.

A. — he told me if I was interested to call you.

Q. And what did you do next?

A. I don't think I called right away. I think it was around January the 12th or 13th of 1993, I called you at your office.

Q. Why were you interested at that time?

A. Well, I was interested in any sort of legislation or whatever you may call it, that would — could possibly help me in the future with a future claim.

Q. And sir, what if any meetings did we arrange during that telephone call?

A. When I called you on the 12th or 13th, you told me that you'd come down to my house, which you did on January 14th, 1993.

Q. And at that time, sir, what did I tell you about the proposed class action?

[Tr. 147] A. Although you didn't have the formal documents there, you had a list of — you had the schedule of monetary awards for the different illnesses, and you did explain to me at the time that simple exposure or pleural plaguing may not be sufficient grounds to recover any damages under the suit, that you had to be impaired. I looked at the list. The numbers there, they seemed consistent with some of the — some of the settlements that I knew other members of my local and other people had gotten in the past.

Q. Now, when you say you looked at a list of numbers, are you referring to compensation benefits and —

A. Yes, sir.

Q. — and dollar amounts?

A. Yes, sir.

Q. And at that time following our meeting of January 14th, What was your view of a proposed class action settlement?

A. I felt that it was — it would be faster than the tort system. That it had certain dollar amounts spelled out that were within certain ranges. It was not like the present tort system where it's a gamble of what you're really going to get. And it made me feel a little more secure in the fact that there would be money for me if I ever had a claim in the future.

Q. And sir, after we talked about the class action and the proposed settlement that had been negotiated between the CCR [Tr. 148] companies and Greitzer and Locks and other class counsel, did you agree to be a class representative in the class action lawsuit which we were going to file the next day?

A. Yes, I did.

Q. Did you authorize myself and Greitzer and Locks to file the class action lawsuit on your behalf and your wife's behalf?

A. Yes.

Q. Did we sign any papers at that first meeting on January 14th, 1993?

A. Yes, sir. I signed a contract naming you, Mr. Nolan and Mr. Locks' firm to represent me.

Q. And sir, you have before you and I refer you to Exhibit SPA-20.

A. Yes.

MR. NOLAN: Does your Honor have that?

THE COURT: Don't worry, go ahead. I've got everything up. Go get the book.

MR. NOLAN: Here's an extra copy, your Honor.

THE COURT: Thank you.

BY MR. NOLAN:

Q. Mr. Vogt, is Exhibit SPA-20 the two-page contract of employment and power of attorney that you and your wife signed on January 14th, 1993?

A. Yes, it is.

* * * *

[Tr. 152] A. Yes, because they were in the tort system at that time.

Q. Now, Mr. Vogt, have you been kept up to date on the progress of the Georgine class action since it was filed?

A. Yes.

Q. Did you receive any papers from me after January 15th, 1993?

A. Shortly after January 15th or 14th of '93, I received from you a copy of the stipulation, the settlement, and with that a letter from you saying if I had any questions about the stipulation, to call you.

Q. And sir, did we later meet about the stipulation and discuss its terms?

A. Let's see. We did — in January of '94 I believe — wait a minute, no. I don't think we did.

Q. Now, sir, did you receive any correspondence from your union concerning the Georgine class action?

A. Yes, I did.

Q. And sir, I direct your attention to Exhibit SPA-24.

(Pause in proceedings.)

Q. Do you have that in front of you, sir?

A. Yes, sir.

Q. Is Exhibit SP-824 a six-page letter that you received from Mr. Keith Wagner, the business manager of Local 11 in December of 1993?

A. Yes, it is.

[Tr. 153] Q. Sir, did you receive any correspondence concerning the settlement from anyone else?

A. Yes, on January 7th of 1994, I received a Dear Client letter from the law offices of Peter Angelos.

Q. And has that been marked Exhibit SP-323? A Yes, it has.

Q. And is Exhibit SP-323 a copy of a nine-page letter dated January 7, 1994 from Mr. Angelos with attachments?

A. Yes.

Q. I direct your attention, sir, to the third page of Exhibit 824 — excuse me — 823 — sir, on the third page of Exhibit 823, do you see your name typed?

A. Yes.

Q. After you received this letter, what did you do?

A. Well, I wasn't aware that I was a client of Mr. Angelos and I thought maybe — well, back in the early '80s I did go to his office for an asbestos screening —

Q. Did you sign anything? Did you sign a retention —

A. Well, that's —

Q. — agreement at that time?

A. I wasn't sure, so I called his office and I was informed that I was not in fact one of his clients.

Q. Now, sir, do you have family and friends who have been exposed to asbestos?

A. Yes.

[Tr. 154] Q. Have any of them filed lawsuits?

A. Yes, they have.

Q. For their asbestos exposure?

A. Yes.

Q. And, sir, can you describe what you personally know about how these folks have done in the tort system?

MR. ROSENBERG: I'm going to object to that, your Honor.

MR. BARON: Your Honor, I object on foundation.

MR. ROSENBERG: I object on hearsay. If this is being offered to prove the truth of how they did — in lawsuits, I believe.

THE COURT: Mr. Nolan.

MR. NOLAN: No, your Honor, it's being proved not for the truth of the matter, but for what his understanding is and how that has influenced him in his decision to be a plaintiff in this case.

MR. ROSENBERG: Your Honor, with all due respect, he does have a lawyer who I'm sure explained to him the differences between the court system and the Georgine system.

THE COURT: Well, two things. Number one, the form of the question is flawed and I'll sustain the form of the question. The second ruling is it's relevant and it's not offered for the truth and it's important to the Court and I'll hear the testimony.

[Tr. 155] BY MR. NOLAN:

Q. Mr. Vogt, do you know, sir, whether your father has filed a lawsuit in the tort system?

A. Yes, he has.

Q. You mentioned that your father was an asbestos worker?

A. Yes.

Q. If you know, sir, when did he file his lawsuit?

A. Approximately eight years ago.

Q. And, sir, has your father had a trial on the merits of his individual claim, if you know?

A. No, sir.

Q. Now, earlier Mr. Vogt, you described your reasons for retaining my firm and Mr. Locks' firm back in January of 1993. Would you describe your reasons for requesting that this Court approve the class action settlement that was filed on January 15th, 1993?

A. Yes, sir. As I stated earlier, I've seen a lot of — a lot of asbestos cases, a lot of friends, several relatives and it's — the dollar amounts that they have received has been — has varied from four figures to six figures for almost the same exposure, the same impairment. And it seems like there's very little equity there.

What I feel is fair about this stipulation is that the dollar amounts are based on national averages from what I've understood, the settlement time is very short, the [Tr. 156] Statute of Limitations is waived which I feel is very good.

The lawyers' fees are cut. So much of the money that the companies have that they're using that should be going to the people that are actually exposed or impaired, I feel is — I feel too much of it is going for legal fees and this will help that.

Q. Mr. Vogt, under the Georgine settlement, does everyone who has been exposed to asbestos manufactured by these companies qualify for an immediate cash payment?

A. No, sir.

Q. Why not, sir?

A. Well, they have to meet certain medical and exposure criteria. They have to be impaired to a certain point stipulated in the settlement.

Q. Mr. Vogt, do you understand that some people who now get money in the tort system will not satisfy the medical requirements and will not be able to get any money from the settlement unless and until they meet those requirements?

A. Yes, sir.

Q. Do you think that's fairer, sir?

A. Yes, I do because I think that the money that they would have gotten could be better used for somebody that's — that is impaired.

Q. Lastly, Mr. Vogt, were you present in court here on Tuesday?

[Tr. 157] A. Yes, sir.

Q. And were you present when Mr. Motley made his opening statement and described a plaintiff who had stated that he had seen over the years a lot of people get a lot of money, some people get very little? At Page 22 of the daily copy, Mr. Motley went on to say, "I've seen the well running dry. A lot of big outfits going bankrupt" —

MR. BARON: I hate to interrupt the reading, but I do object.

MR. ROSENBERG: This is going to be a leading question.

MR. BARON: Well, not only that, the —

THE COURT: I don't know what you're trying to accomplish, Mr. Nolan, but —

MR. NOLAN: I'll ask a different —

THE COURT: — it doesn't seem like an appropriate question to me.

MR. NOLAN: I'll ask a different question.

BY MR. NOLAN:

Q. Do you remember that statement in Mr. Motley's opening remarks?

A. Yes, sir.

Q. Was that a statement that you made in the course of your deposition on January 12?

A. Yes, it was.

* * * *

CROSS EXAMINATION

[Tr. 164] BY MR. ROSENBERG:

Q. The 12th of 1994, you did not have any disease of the chest, that is true, isn't it?

A. Yes, sir.

Q. And you had no complaints, physical complaints as a result of your exposure to asbestos, is that right?

A. Correct.

Q. It is equally true, is it not, that you are not bothered by your exposure to asbestos today in a physical sense, is that right?

A. Not in a physical sense, no.

Q. Now, prior to your participation in this class action, you had never consulted with a lawyer for the purposes of filing a claim as a result of your asbestos exposure, isn't that right?

A. Yes.

Q. You testified under oath on January 12th, 1994, that you were not seeking money damages at the time that you agreed to be a class representative in this case, and at the time that the lawsuit was filed? You testified that way under oath then, is that correct?

A. Yes.

Q. And that was true then, is that right?

A. Yes.

[Tr. 165] Q. And it is true today, is it not, you are not seeking money damages today?

A. Not today, no.

Q. Now, you testified that you saw Mr. Nolan for the first time in connection with this settlement with your participation in Georgine on January the 14th, 1993, is that right?

A. Yes.

Q. Prior to that time, had you reviewed any of the terms of the proposed settlement in Georgine?

A. No.

Q. Now, I believe you testified about the materials that you did review on January 14th at the time that you agreed to become a class representative, yes, is that correct?

A. Yes.

Q. And you have nothing further to add with regard to those materials, whatever it was that you said on direct examination concerning what you had seen, basically a sheet concerning the

payment of benefits, was there anything else in writing that you looked at besides that?

A. I'm not sure if it was in writing or not, but Mr. Nolan told me that the counsel's fee would be 25 percent, the standard fee.

Q. And you found that to —

THE COURT: Mr. Vogt, you're going to have to speak

* * * *

[Tr. 206] BY MR. WOLFMAN:

Q. Mr. Vogt, I am Brian Wolfman, I represent some of the objectors.

You said that you had some x-rays screenings, is that correct?

A. Yes.

Q. And as I understand it, your company pays for those screenings?

A. Yes, they do.

Q. And what is the name of the company, sir?

A. I work for PTX, Incorporated, and when I do asbestos removal.

Q. Were you working for them on January 15th, 1993 when the lawsuit was filed?

A. Yes.

Q. Okay. At that time you were not paying for your x-ray screenings, is that right?

A. That's correct.

Q. Do the other workers of that company have x-ray screenings to your knowledge?

A. By law they have to, yes.

Q. How many workers are there?

A. That varies greatly.

Q. Well, approximately in January '93?

A. I would say from two to ten.

[Tr. 207] Q. And am I to understand that none of those workers pay for their x-ray screenings? To your knowledge they're all paid by the company?

A. That's correct.

Q. Let me ask you this. Who was at the — the first time you met Mr. Nolan about this lawsuit, who was at that meeting beside yourself and Mr. Nolan?

A. My wife was present in the house.

Q. Did she attend the meeting, sir?

A. Well, we were more or less in the same room.

Q. To your knowledge, do you know if she has read the stipulation of settlement?

A. No, she has not.

THE COURT: Whether she's what? I didn't understand you.

MR. WOLFMAN: It's whether his wife has read the stipulation of settlement?

THE WITNESS: No, she hasn't read it.

BY MR. WOLFMAN:

Q. Okay. Do you know that she's a representative plaintiff in this action?

A. Yes, I do.

MR. WOLFMAN: That's all I have, your Honor.

TESTIMONY OF TY ANNAS

* * * *

[Tr. 225] Q. And what were you doing?

A. I was a helper to begin with.

Q. What's a helper?

A. They call it an improver in the union. That's one that does all the leg work, makes mud and all the stuff like that.

Q. All right. We're going to have to tell the Court what mixing mud means?

A. Well, it's insulating materials that are used to finish off elbows and fittings or all sorts and kinds. Equipment pieces. You mix it up with water with a hoe, and carry it out to the mechanic that's using it.

Q. Let me see if I can get away with this. Were you working with asbestos containing materials at that time, mixing it up and applying it?

A. Yes.

Q. And when you talk about mud, is that asbestos containing —

A. Yes.

Q. — cement products?

A. Yes.

Q. All right. Now, Mr. Annas, how long did you yourself work with your hands or with the tools in the asbestos trade, working with asbestos containing products?

A. Will you hold that until I can finish what you first asked me, please?

[Tr. 226] A. Yes.

A. And that was to recap my work history.

Q. Okay.

A. Which will answer your question, I believe.

After these original three jobs, I got with Daniel Construction, which is now Flor-Daniels (ph) at Pensacola when they took that job over, and I was a mechanic in that sense from then on.

The union has their stipulations what you can do, and I excelled in everything, but I couldn't go in the union, so when I got with Daniels I was able to perform pretty much all of the duties of a mechanic and then I went on to a foreman in later years, general foreman and then superintendent. In about 1973, I went into management and I never actually worked with hands-on.

Q. When you refer to being the mechanic, is that the same thing as an insulator?

A. Yes, sir.

Q. And throughout your career, 1951 into the 1970s, were you working with asbestos-containing products on a daily basis?

A. Every one of them that's listed in these after sheets I've worked with them.

Q. When you speak of the after sheets, you're talking about the attachments —

A. Yes, sir.

[Tr. 227] Q. — to your exhibit?

A. Yes, sir. To the best of my knowledge.

Q. Mr. Annas, going back to your work as an insulator, from the 1950s, '60s, and '70s, do you believe that you were exposed to asbestos on a regular, frequent basis?

A. Every day.

(Pause in proceedings.)

Q. Mr. Annas, were you married? Were you in the past married?

A. Yes, sir. We were married in 1949.

Q. And you and your wife had several children?

A. Two.

Q. And how about grandchildren?

A. We have five.

Q. Did your wife ever work occupationally with asbestos-containing materials?

A. No, sir.

Q. Do you currently have an asbestos-related disease or injury that a doctor has told you about to this date?

A. My last Thursday x-ray didn't show anything.

Q. And that was this past week you got x-rayed?

A. This past Thursday.

Q. Mr. Annas, because of your occupational exposure to asbestos in the past, do you have any concerns for your own future health —

[Tr. 228] A. I have —

Q. — as it relates to asbestos-related diseases?

A. I have many concerns for myself and my children.

Q. Why don't you explain to the Court why you have concern for your children from asbestos disease?

A. They were under the same exposure as my wife was when she washed my clothes and these skins that they put around the insulation materials.

Q. Would you tell the Court what happened to your wife and why you tie your concern about asbestos disease to your wife's —

A. You want —

Q. — condition?

A. How far back do you want to go with it?

Q. As far as back you want to tell him what happened.

A. In 1984, I believe it was, my wife was always good to have her physicals and she had pneumonia in Hopewell, Virginia and when she got over that they naturally x-rayed her again and it showed some calcification in her lung, her side and —

Q. What we call the pleura?

A. Yes. But we did not understand that. The doctor said it was an area which he had to watch.

When I retired, to keep myself active, I built a new home. She got very sick with breathing problems and we [Tr. 229] didn't know whether she was having heart problems or no.

So we went to Statesville, North Carolina to a heart specialist. He sent her to the hospital and had her x-rayed and her whole right lung was flooded.

Q. All right. You started out in 1984 in Hopewell, Virginia. What time frame, give me a year, that you went to the doctor in North Carolina and you just described to us?

A. 1990, I believe it was.

Q. All right.

A. She was losing her breathing capacities. And when he discovered the lung flooded, naturally they drew the fluid off, had it analyzed and the prognosis was mesothelioma.

I went to the dictionary to find out what that was and it is in five words a rare and fatal disease.

Q. Let me stop you for just a minute. Prior to that time, when your wife was diagnosed with mesothelioma, had you in the past, because of your work history, been called upon from time to time to testify in asbestos litigation as a product ID witness or a co-worker witness?

A. No, I have not.

Q. Had you helped identify people that worked on various jobs from time to time?

A. I have identified people that worked for me and with me.

Q. And you were familiar with the law firm of Ness, Motley from that involvement?

[Tr. 230] A. From that and Bob Branton.

Q. Okay. And Bob Branton is an employee of Ness, Motley?

A. He is.

Q. When you found out your wife had mesothelioma, beyond what you did medically, what did you do about any legal rights you may have?

A. Can I continue the — going to the doctor?

Q. Yeah, that'd be fine.

A. Okay. We researched where we might go for help. We talked to Mercy Hospital in Atlanta, Georgia and Duke University

Hospital in Durham, North Carolina and we decided to go there with her which we did. They determined that they had a drug maybe could help her. How much in detail do you want me to go from here, sir?

Q. Did your wife undergo treatment?

A. They went and went into her side and put this anti-cancer medicine in there. We were there two weeks under high — high temperatures. They didn't know what it was causing the temperature, infection or what. And between the heads there they finally agreed to operate.

So they opened up her rib cage, went in and scraped both sides of the lining of the lung area, left two tubes in it to drain and a week later they took the tubes — she was there 29 days. When they pulled the tubes out, the first tube looked as pretty and pink as any area of the lung you'd [Tr. 231] ever want to see. The bottom one looked like a handful of asbestos mud shorts.

Q. What'd you do next?

A. We went home. We had no idea what time frame if any that she might get better. She did not get any better. Her breathing got worse. From the time of this discovery of the fluid till nine months later, she passed away.

Q. And that was when?

A. July the 17th, 19 and 92. She died a very horrible death. I hope and pray that none of you have to experience that.

(Pause in proceedings.)

Q. Mr. Annas, at some point in time, in late 1991, did you and your wife make the decision to seek a legal claim on behalf of her and you for her mesothelioma?

A. It's ironic you asked that because when we got the first news, Bob Branton called me that evening for some information about another friend I worked with and I said, Bob, listen, what's (indiscernible) and he couldn't believe it. So he came up the next day and we talked and I signed a contract with Ness, Motley to pursue whatever recovery that was available for us.

Q. And a lawsuit was in fact filed on behalf of your wife shortly thereafter?

A. Yes, sir.

* * * *

[Tr. 238] limitations in your wife's case?

A. I was told if it was over two years I was out of luck.

Q. And was there discovery done in your deposition and on the doctor's on that issue?

A. Yes.

Q. Was the existence of the chest x-ray reports from 1984 one of the issues on the statute of limitations?

A. It was.

Q. When you discussed with Mr. Lyle the Georgine settlement, did you discuss with him the waiver of the statute of limitations that was available under the settlement?

A. Yes, I did.

Q. Did you think that was a good thing?

A. I certainly did.

Q. Why?

A. Because there's so many people like in our case don't even know they have that until it's too late.

Q. What other features made you want to be the class representative in this case? Or some of the others?

A. The areas of being exposed to asbestos like myself opposed to one being exposed like my wife. I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions. If my wife's breathing had not deteriorated, there would never have been a case against the [Tr. 239] asbestos companies.

Q. Did you understand at the time you agreed to be a class representative that there were persons that had calcified pleural changes similar to your wife's that had no breathing impairment that would not be eligible for compensation under this settlement?

MR. BARON: Objection. Leading.

THE COURT: Sustained.

BY MR. RICE:

Q. When you met with Mr. Lyle, did you discuss the medical criteria in this settlement at all?

A. We did.

Q. And did you discuss the medical criteria as it related to the unimpaired claims?

A. I am aware of it and why should they be compensated.

Q. Was that the conclusion you reached in your own mind?

A. Yes, sir.

Q. Mr. Annas, do you believe or did you believe in December of '92, and do you still believe today that the Georgine class action settlement is a fair and reasonable settlement?

A. I expressed just now, I did then and I am also more proud of it today.

* * * *

[Tr. 242] Exhibit 1042A for identification on the record.

MR. LOCKS: That's SP.

MR. BARON: I believe it's SP rather than objector exhibits.

THE COURT: SP.

(Discussion off the record.)

THE COURT: Capital A, all right.

THE WITNESS: Mr. Rice, I had received a copy of this from my financial planner.

BY MR. RICE:

Q. All right. And when you got that editorial, did it sort of make you mad?

A. I responded right away, and I read my response into my deposition.

Q. Do you have a copy of the response that you wrote at the time you received this editorial?

A. Yes, sir.

Q. Do you have it with you?

A. Yes, sir. Do you want it?

Q. Would you get it out for me.

MR. RICE: And, your Honor, for the record Exhibit 1042 is an exhibit.

BY MR. RICE:

Q. Mr. Annas, what's marked as SP-1042, is that a copy of the editorial that you wrote in response to the receipt of [Tr. 243] Mr. Baron's editorial?

A. Yes, sir.

MR. BARON: Your Honor, I object, it was a letter.

MR. RICE: Excuse me, a letter.

THE WITNESS: Yes, sir, it's signed by me.

THE COURT: Let's make the record show that SP-1042A is a copy of a piece in the Wall Street Journal, Thursday, May 6th, 1993 entitled counterpoint in part by Mr. Baron. It's a four column item. Go ahead.

MR. RICE: Thank you.

BY MR. RICE:

Q. Mr. Annas, does Exhibit 1042 which is a letter to the editor of the Wall Street Journal a document that you wrote yourself?

A. Yes, sir.

Q. And does that document help express the feelings that you had about this settlement and Mr. Baron's comments on the settlement?

A. Yes, sir.

Q. Would you publish that in the record, please, sir?

MR. BARON: Have you offered it?

BY MR. RICE:

Q. Mr. Annas, just read it into the record.

THE COURT: Maybe he didn't understand your question.

[Tr. 244] MR. BARON: I'm sorry. Has this been offered yet?

THE WITNESS: Do you want me to read this?

BY MR. RICE:

Q. I want you to read your letter to the editor.

THE COURT: I don't think it's been offered.

MR. BARON: Your Honor, I object unless it's offered. And I'm going to object to the relevancy of the —

THE COURT: I think you already did. The objection on relevancy is overruled.

MR. BARON: Okay.

MR. RICE: We offer it, your Honor.

THE COURT: Is the only objection relevancy, Mr. Baron?

MR. BARON: Yeah.

THE COURT: You're very persuasive to yourself.

MR. BARON: Yeah.

THE COURT: We try to be that. Objection on relevancy is overruled, it's received in evidence.

(Settling Parties Exhibit 1042 received in evidence.)

BY MR. RICE:

Q. Mr. Annas, would you please read it into the record for me, and then I will ask you a couple of questions about it.

A. "Dear Editor: While I do read the Wall Street Journal occasionally, someone sent me a copy of Counterpoint by F. M. [Tr. 245] Baron in the May 6th, 1993 edition which is (an asbestos settlement with a hidden agenda), and I very much wish to express my feelings and thoughts on this matter.

"I am one of the plaintiffs in the Carlough class action Mr. Baron so freely criticizes while contending he has my best interest at heart. I worked for over 39 years in heavy construction, maintenance and operations, and many of those years were spent doing hands-on asbestos insulation work.

"I have not developed an asbestos-related disease and I know many many men I worked with who are not now sick. We are the fortunate ones. I believe my exposure period would compare to anyone working in the insulation trade from the late forties through the seventies, after which time I was in a management position.

"After being briefed on the Carlough action, it was easy to offer to be a representative for a speedy resolution to the current

wait until you die situation, while defense lawyers and transaction costs eat up the funds so badly needed for those unfortunate ones who are due just and speedy compensation.

To continue with the current system, I strongly believe will in time bankrupt the entire industry, with the cases tied up in court, while attorney fees eat up the proceeds. Those asbestos companies involved with the [Tr. 246] Carlough action, although only a part of the industry, have, now faced up to their legal responsibility and no longer deny their past mistakes, but are seeking to move forward in a very complex matter. They have my full support.

"Mr. Baron fails to point out that this action will come about only after a full public fairness hearing are conducted, so that all of us have the right to speak and be heard, even as Mr. Jones that was in his article without paying additional legal fees.

"So you may ask why am I concerned and involved when I'm not sick? The answer to that is that I lost my dear wife in July 1992 after suffering for nine months from asbestos called cancer, mesothelioma. She died a horrible death before she could receive any compensation, without even the satisfaction of knowing that any company would accept responsibility for her death, and without the comfort of knowing that, at least she could leave some financial and material aid to her children and grandchildren.

"I truly believe under the Carlough action the victims will receive a speedy, honest and very much needed compensation for their pain and suffering. Thank you for considering my thoughts for a better way. Sincerely Ty D. Annas."

Q. Mr. Annas, what do you mean for a better way?

A. Cases that are being tied up in the tort system under [Tr. 247] this action can be settled very quickly.

Q. Mr. Annas have you enjoyed your trip to Philadelphia?

A. Especially when I saw the Liberty Bell.

Q. What about that?

A. I could have cried.

Q. Why?

A. At my age I never dreamed I [sic] get to see that thing.

MR. RICE: Thank you, Mr. Annas. I pass the witness.

MR. LOCKS: Afternoon break?

THE COURT: Yes, we might as well. I'm just making some notes. Thanks, Mr. Locks. We'll have a 15-minute recess.

(Recess, 3:36 o'clock p.m. to 3:51 o'clock p.m.)

THE COURT: We resume after the afternoon break. Please be seated. You may proceed to cross-examine.

MR. ROSENBERG: Thank you.

CROSS-EXAMINATION

BY MR. ROSENBERG:

Q. Good afternoon, Mr. Annas. My name is Howell Rosenberg.

A. Good afternoon, Mr. Rosenberg.

Q. Mr. Annas, on January 15th, 1993 at the time that the Georgine lawsuit was filed, you were not seeking any money damages for yourself, were you?

A. Not for myself.

[Tr. 248] THE COURT: Quiet, please.

BY MR. ROSENBERG:

Q. Now, I believe that you testified on January 14th, 1994 at deposition, is that right?

A. Yes.

Q. Do you remember that?

A. Yes, sir.

Q. And you have had the opportunity, and have in fact reviewed your deposition before you've testified today?

A. Yes, I have.

Q. At deposition you testified that as of January 15th, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?

A. That's right.

Q. And that is correct today?

A. Yes, sir.

Q. And when you appeared at deposition, you testified I believe that you got involved in this case in order to help to get the case resolved and to help people before the money runs out, in that correct?

A. That's my statement.

Q. And at the time that you agreed to get involved in this case, that was your desire, that basically was your goal, to be class representative to help preserve the money, is that right?

* * * *

[Tr. 262] BY MR. BARON:

Q. Have you been given any information by these lawyers as to the economic well-being of these 20 companies?

A. I have not been given any information before I am hearing I'm very proud of. That this action will not go in the hole for lack of money.

Q. Okay. I believe you're right.

A. Thank you.

Q. Mr. Annas, remember when I took your deposition?

A. I sure do.

Q. I'm sure you do.

(Laughter.)

Q. I asked you in the questions on Page 54, whether or not you believed — it's Line 12 — that you were an appropriate spokesman for people who have pleural plaques that continue to work. And you told me you didn't think you were.

A. No. I won't change that today.

* * * *

REDIRECT EXAMINATION

[Tr. 268] A. 77 and 78?

Q. Yes, sir.

A. I have that Page 77.

Q. Would you look at the line that's numbered 21. Do you see that?

A. So when — yes.

Q. Mr. Baron was asking you questions about whether you had seen anything in the newspapers about the Georgine settlement and did you at that time tell him about a paper you had seen down at your daughter's house?

A. That was not the court thing. It was a local lawyer's ad he put in there.

Q. All right. But you saw that in the paper?

A. Yes, sir.

Q. All right. And you did see the Wall Street Journal article we talked about —

A. I did.

Q. — earlier?

A. I did.

Q. Turn back with me to Page 52, if you would.

(Pause in proceedings.)

Q. The line that starts out — Line 15 on Page 52. This was right before the question Mr. Baron asked you a while ago about do you believe you're an appropriate spokesman for the people?

* * * *

[Tr. 271] Q. Mr. Annas, at the time you agreed to be class representative, you were aware that people with pleural plaques that had no impairment would not be able to receive immediately cash compensation under this settlement, but had what you believed to be other benefits. I ask you —

MR. BARON: Your Honor, I object, leading.

THE COURT: Sustained, it's leading.

BY MR. RICE:

Q. Mr. Annas, what did you understand would happen to people that had pleural plaques with no impairment under the Georgine settlement?

MR. BARON: Your Honor, I object, it's inappropriate redirect. I don't think we covered that in cross.

THE COURT: Well, Mr. Rice, your response?

MR. RICE: I believe that when he asked him questions about — on Line 54, about whether he was an appropriate spokesman, that that brought in this area of inquiry.

THE COURT: The objection is overruled, I agree with you.

BY MR. RICE:

Q. Do you remember the question, Mr. Annas?

A. No, sir.

Q. Let me try it one more time.

Why do you believe — let me ask it this way.

[Tr. 272] Why do you believe it's fair if the Georgine settlement is approved in its entirety for persons with pleural plaques to be deferred as far as cash compensation?

A. I don't believe if there is impairment that anyone needs to be trying to collect money. If there is a situation down the road five years from now with me, and my asbestos exposure develops into an impairment, certainly I can go for a settlement, and I'm concerned about my son Mike back there the same way.

Q. Thank you, Mr. Annas.

A. People that are not impaired are exactly like those on the welfare system.

MR. ROSENBERG: Thank you, Mr. Annas.

MR. BARON: Might I ask one, your Honor.

THE COURT: One, you've got it.

RECROSS-EXAMINATION

BY MR. BARON:

Q. Mr. Annas —

A. Yes, sir.

Q. — you then believe that people who have pleural plaques should receive no compensation whatsoever, and that was your intent in entering into this agreement, correct?

MR. RICE: Objection, your Honor.

MS. WHITE: Objection.

THE COURT: Overruled, it's cross-examination.

[Tr. 273] THE WITNESS: If they are not impaired.

BY MR. BARON:

Q. If they're not impaired they should receive no compensation whatsoever?

A. That's my feelings.

MR. BARON: All right. Thank you.

THE WITNESS: Thank you, sir.

THE COURT: Mr. Annas, you're excused from the stand, sir.

THE WITNESS: I thank you, sir. It's really been a pleasure this week.

THE COURT: It's nice to have you in Philadelphia.

THE WITNESS: Thank you.

THE COURT: I'm sorry about your wife's passing.

THE WITNESS: Thank you, sir.

(Witness excused.)

TESTIMONY OF GEOFFREY HAZARD

* * * *

[Tr. 5] MS. WHITE: Good morning, your Honor, I'm Wendy White for the CCR defendants.

BY MS. WHITE:

Q. Professor Hazard, I'm going to start with a difficult question which is, would you please tell the Court what your address is?

A. My address at present 452 Humphrey Street in New Haven, but we're moving to Philadelphia, and we have a resident [sic] in Chestnut Hill here.

Q. What are you currently doing?

A. My present employment is in two jobs. One is I'm professor of law at Yale University where I teach in the law school. And the other which I have held concurrently for the last nine years is director of the American Law Institute.

The term director doesn't mean I'm on the board of directors, it really means I'm executive director, I'm the paid senior manager. And the American Law Institute is located here in Philadelphia.

Q. What are you going to be doing next year?

A. I'm going to join the faculty at the University of Pennsylvania.

Q. Are you teaching this semester?

[Tr. 6] A. Yes, I'm teaching in New Haven. I'm going back and forth.

Q. Professor, could you briefly describe your experience in the field of legal ethics?

A. Yes. Well, I was admitted to practice law in Oregon in 1954 and practiced in a general practice firm, did among things personal injury defense work.

After a year with the Oregon legislature, I joined the faculty at the University of California, taught civil procedure which had some ethics aspects, but it was not my primary subject at that time.

In 1964 I moved to Chicago where I undertook two responsibilities, one I joined the faculty at the University of

Chicago. And in the course of my service there, I taught courses in professional responsibility, primarily legal services for the poor.

I was also executive director of the American Bar Foundation. The American Bar Foundation is a non-profit research organization affiliate of the American Bar Association, and it did then and still does a wide range of studies about the legal profession, including ethical aspects of law practice.

A major part of the activity, the Bar Foundation when I was there, was to provide research assistance and I provided some consultation to the ADA project that produced [Tr. 7] what is called the Code of Professional Responsibility.

The Code of Professional Responsibility is a set of rules of ethics for lawyers. It was promulgated by the ABA after a six-year project in 1970. As I say, I was involved in consultation in that project. The primary reporter was Professor Sutton from Texas.

And then in 1970 I moved to New Haven and assumed a position at Yale, and just about that time I was engaged to be a consultant and draftsman for the Code of Judicial Conduct, which are the rules concerning judicial ethics and they have some incidental aspects so far as legal ethics are concerned.

In 1975 or so, I did a book based on some conferences we had concerning ethics in the practice of law, and that's the name of the book. It was a very interesting and searching colloquium on the subject.

In 1978 I was asked to be consultant and then reporter for an ABA special committee that was called the Kutak Commission, K-U-T-A-K, so-called because the name of the chairman of that commission was Robert Kutak of Omaha. And that project, that project that commission was responsible for was the reconsideration of the Code of Ethics, the Code of Professional Responsibility.

They concluded that the format should be changed, and that a number of provisions should be reconsidered and [Tr. 8] reformulated. And that undertaking led to a set of rules called the Rules of Professional Conduct, which were designed by the ABA as a recommended replacement for the Code of Professional Responsibility.

I should say the Code had been adopted in most states in the interval between 1970 and 1983. It was in 1983 that the ABA promulgated the Rules of Professional Conduct. That was about a four-year drafting, negotiation, revision process in which I was continuously involved.

And thereafter the Rules of Professional Conduct have been adopted in most states, in many instances with some revision. They have been adopted here in Pennsylvania, they were adopted in New Jersey. They were drawn upon for substantial revisions of the rules in New York and California and Illinois for example. And I've watched those developments with care and have been involved in some of them.

In 1985 I think, after I became director of the American Bar — American Law Institute, we began a project which we are still engaged in, maybe it was 1986 that we started, called the restatement of the law governing lawyers. In addition to the Ethics Codes that I have just referred to, there is a lot of common law governing lawyers, for example, the attorney-client privilege, and the contract between a lawyer and client, and other matters that are not covered in [Tr. 9] all details.

And some of them aren't covered at all in the Rules of Professional Conduct, but are the subject of common law. And obviously that involves ethical aspects, too. That project is still going on, and I have been involved in it.

And over the years since 1982, I've done substantial consulting practice, giving lawyers and judges advice or consultation in matters of ethics. Writing opinion letters, participating as an expert witness in various kinds of matters, and I do on a continuing basis, continuing legal education in the sense of participating in panels and giving talks.

We gave one to the Pennsylvania State Trial Judges here last summer, and I'm giving a talk to probate and estate planner lawyers soon, that is next month, and those are examples of the kind of continuing legal education of work that I've done.

Q. Professor, would you now describe your expertise in the field of class actions?

A. Well, when I first started teaching in 1958 I taught civil procedure and it's still one of my primary subjects. And a special field that I was quite interested in was joinder of parties, the problem of multi-party litigation. I've written several articles on that are at least incidentally related to class suits.

[Tr. 10] And in our case book that was published first in 1962, we devoted an unusual amount of attention, both in case annotation and textural notes about class suits, and tried to bring some kind of order in terms of analysis to what was at that point an extremely confused body of law.

And that analysis, even though it was in a case book, was relied on in significant part in the 1966 revision of the class suit rule, Rule 23. A lot of people think that rule is difficult now, but I can say it's a lot clearer than what was before.

And indeed the analysis of the difference between the three kinds of class suits, B1, B2, B3 is taken from the book that I've just referred to, the case book material. And since then we have revisited the problem of class suits in that book which is now in its sixth edition. The treatment of class suits is a major portion of the book.

In the meantime, ALI has had two studies that I've been closely supervise — I've been the close supervisor of. One is on enterprise responsibility. That was a reporter's study that dealt with a lot of problems, but included problems such as the asbestos cases, and the Bendectin (ph) cases, and other so-called mass torts, and a question then whether a class suit or some such might be an appropriate way for handling some types of those cases.

And Professor Arthur Miller and Dean Mary Kay Kane [Tr. 11] have just finished up a study also under the auspices of the ALI on complex litigation, of which this case is obviously a type. But that study focused on problems of administering those cases and various aspects to them, including as an incident, possible treatment of some of them to the suit class procedure.

And over the last ten years, I have been engaged intermittently, I guess, in a manuscript that goes through the history of class suits from the emergence of the concept in some coherent form about the middle of the Eighteenth Century, down to the

recent decisions, for example in *Philips Petroleum against Schutz* (ph), focusing on certain aspects of class suits.

And so I consider that I have paid considerable attention to the analytic and conceptual structure of these things, the legal aspects of them, and their practical administration since I have started teaching procedure.

Q. Professor, could you now describe your experience with or knowledge of the asbestos litigation?

A. Yes. My first acquaintance with an asbestos litigation in any focused way was when Dean Harry Wellington, who was the dean of the Law School at Yale some years back, became involved in the so-called asbestos facility in an attempt to work out some kind of settlement payments, medical exam, nonlitigation mechanism, and talked with him. And I think [Tr. 12] Harry gave a paper at the law school, an informal one describing what was being attempted and how it was going.

Not too long after that, I think I've forgotten when it was, I began following the studies done by Rand (ph) Institute of Civil Justice. I became a member of their advisory board for a period, I've forgotten exactly what years it was. I'm still what they call an emeritus member, and get all the publications and follow them.

In my opinion, Rand has done the best quantitation empirical study of tort litigation in general of so-called mass torts, in particular of any recognized scholarly or research institution. And I have paid close attention to that.

We have had a couple of conferences that I have attended on that subject. And the enterprise responsibility project that I mentioned to the ALI, some of the people there were quite familiar with the asbestos cases, and that was one of the aspects we were talking about.

And I am acquainted with — have followed the literature in general terms at any rate, and so I consider myself particularly from the judicial administration point of view, which has been another subject that I have been interested in and have done work in, so I have followed it I think fairly consistently.

Q. Are you familiar with an article by Peter Shuck, one of [Tr. 13] your colleagues at Yale?

A. Yes, Peter has done a book on this problem of the pleural registries and the calendar management, and I think the phrase the worse ought to go first. That is the people in most need of redress or compensation ought to have preference on the calendar. And Peter doing that, I remember asking me a question, could a court arrange its calendar in a way that took account of the neediness of claims and I said, as far as speaking on the background of judicial administration, I think it's perfectly clear that a Court can, for example courts make special arrangement for —

MR. BARON: Your Honor, we're getting a little bit outside of the scope of the question that was asked here. If he's going to provide testimony about what he did for Professor Shuck or what is involved in, I think there should be a pending question on that issue rather than just a general discussion.

THE WITNESS: I stop there and just say, I told him —

THE COURT: Well, wait a minute, Professor.

THE WITNESS: I'm sorry, sir.

THE COURT: Excuse me.

THE WITNESS: Yeah. Do you want me to just stop?

THE COURT: Typically in a courtroom when an objection is made the stops talking. That's been my [Tr. 14] experience.

THE WITNESS: Sorry.

THE COURT: I think you will do that for us. Thank you.

MR. BARON: And I certainly don't object to the —

THE COURT: I heard what you had to say. The objection's sustained. He was only asked if he was familiar with the article, and I think the answer could have been yes, and the another question might say how and so forth. So we'll have a few more questions.

MR. BARON: And the record should refl —

THE COURT: The objection's sustained.

MR. BARON: Okay. The record should reflect that he said book, and I think he might [sic] article.

THE COURT: I knew it was an — well, maybe you did write a book. I don't know. I didn't know about the article. There's no

testimony yet about whether there's a book or not a book until this moment.

BY MS. WHITE:

Q. Professor, would you describe your discussions with Professor Shuck about the article, to the extent you haven't already.

Q. The question Peter asked me, he said he was working on this problem. And I said — he asked me essentially, can a court have authority to arrange its calendar in ways that [Tr. 15] takes account of the needfulness of the claims in the cases before it, and I said, yes, indeed that's the whole theory of why you have a special calendar for temporary restraining orders and the like. And that's about what the discussion was.

I knew he was writing on the subject and I have very high respect for him.

Q. Professor, have you written a textbook on professional responsibility for legal ethics?

A. Yes. Professor William Hoades (ph) at the Indiana University and I have done a book called, The Law Governing Lawyers, which is organized around the model rules and is a text on the subject.

Q. If you will turn with me in your notebook to the tab that's identified as Settling Parties' Exhibit 900. Could you identify that for the record?

A. Yes, that's a professional biography or curriculum vitae of me.

Q. And would you turn then to the next document, Settling Parties' Exhibit 900A, and would you describe what that is for the record?

A. Well, this is a sort of boxed chart that lists the cases in which I've been a witness, giving testimony in matters of lawyer conduct and an indication of whether it was testimony by trial or by deposition. And the specifications are a [Tr. 16] little indefinite in some respects.

The details are incomplete on the first page, but after that it's complete. I just keep it on a running basis so that if lawyers ask me, have you ever testified before, I can hand them this document.

Q. I believe, Professor, you're describing the attachment to the revised curriculum vitae which forms the whole exhibit, Exhibit 900A, is that right?

A. Yeah, I guess maybe I missed what your question was. Is the 9A the more up to the date curriculum vitae, is that what you're talking about? Okay. I gave a second copy, a more recent printout of my CV. I think it has maybe one or two more newspaper articles on the back end of it.

MS. WHITE: Your Honor, we would offer Settling Parties' Exhibits 900 and 900A.

MR. BARON: Your Honor, I have no objection, with only one thing that I noticed here, and I might clear this up real quickly.

Professor Hazard, in your resume here, you have omitted the more recent issue of your book, have you not?

THE WITNESS: I don't know. Which book are we talking about?

MR. BARON: The one with Professor Krampton (ph) and Professor Coniac (ph).

THE WITNESS: Let's see. Yes. This printout [Tr. 17] doesn't have it, right. On Page 3, it should say, Law and Ethics of Lawyering, Second Edition, 1994, I think they said with Professor Coniac and Roger Krampton has become an additional co-author.

THE COURT: Excuse me, the date of that issue is what, sir?

THE WITNESS: I think 1994, it just came out.

THE COURT: At the top of Page 3.

MR. BARON: At the top of Page 3. If we could note that change, then we would have no objection to the admission of the —

THE WITNESS: What they're referring to, sir, is if you look down about the fifth book, it says, just before the one that's in Italian, it says, The Law and Ethic of Lawyering, yes, sir.

THE COURT: I found it, yes, sir. I found it.

THE WITNESS: Yes.

MR. BARON: The co-authors and Krampton and Coniac, correct?

THE COURT: That's what he said.

MR. BARON: Okay.

MS. WHITE: The settling parties would offer Professor Hazard as an expert witness on legal ethics and professional responsibility.

MR. BARON: With those limitations, we have no [Tr. 18] objections, your Honor.

THE COURT: The exhibits are received in evidence, and I rule that Professor Hazard are qualified to give opinion in the areas offered.

(Settling Parties' Exhibit 900 and 900A received in evidence.)

BY MS. WHITE:

Q. Professor, have you read the stipulation of settlement in this case, the Georgine case?

A. Yes.

Q. Have you read the depositions of the class plaintiffs?

A. Yes.

Q. Have you —

MR. BARON: Your Honor, at this point, I'm going to have to assert another objection, and I apologize to the Court for having to do at this point.

But as your Honor will recall, we filed a motion pertaining to this particular witness, and it was in the nature of motion in limine. At his deposition which was given, I believe on —

THE COURT: Excuse me, Mr. Baron. I know what the motion was, and I know that it's likely apparently that Professor Hazard has read things since his deposition was taken and perhaps since he wrote a report. That does not, per se, prohibit him from testifying that he read those [Tr. 19] things or testifying in this case.

You have an objection, and I can't remember whether — what I did with the motion at this point.

MR. BARON: Well, I believe you held for the time being, your Honor. You denied it initially without prejudice to reasserting

it, and the point that I'm making is that all of those depositions were available, transcribed, ready to go and available to Professor Hazard several weeks before he was deposed.

THE COURT: If you're renewing the motion, the motion is denied once again without prejudice. I can't tell what affect this has on his testimony, until we find out what's going on here.

MR. BARON: All right.

THE COURT: The fact that he's read something does not, per se, make his opinions different or prejudice the notice given to the objectors about his opinion at all. As a matter of superficial analysis, it just doesn't at this point. We'll see whether it did as time goes along.

BY MS. WHITE:

Q. Professor, have you read the testimony of Larry Fitzpatrick that was given earlier this week in this case?

A. Yes. That is, I read — I don't know whether I read yesterday's testimony, but earlier in the week.

Q. Are you familiar with the deposition testimony of Michael [Tr. 20] Rooney?

A. Yes.

Q. Have you read the opening argument of Mr. Baron in this case?

A. Yes.

Q. And are you familiar with the report of Professors Krampton and Coniac?

A. Yes.

Q. Finally, have you familiarized yourself with the depositions of Professors Krampton, Coniac and Coffey (ph)?

A. Yes.

Q. Professor, could you describe for the Court essentially what you understand the stipulation of settlement to provide?

A. On the side of the plaintiffs, it defines a group of people who will be covered by its terms.

In terms of exposure to asbestos, it specifies certain medical criteria that people so describe — criteria of medical condition that people so described, may have if this agreement — when this agreement goes in effect, if it goes into effect, and people who might have those conditions thereafter.

It specifies a procedure for their making — be able to make claims. It provides that they will not be time barred under the statute of limitation for withholding from making claims, under the terms of this agreement.

[Tr. 21] That they can make — seek compensation, obtain medical examination of evaluation of their condition. Assuming that the condition is of the kind that provides — involves — injury is recognized in these terms, provides a basis of compensation.

It has an arrangement whereby if the people's — individuals' medical condition thereafter worsens, and they come into a — how should we say it, a more severe category, that they're entitled to a reconsideration and additional basis of compensation.

And essentially it covers this arrangement for as long as this agreement remains in force, and it has an initial period, as I understand it, of ten years within which none of the signators can withdraw. And this facilitates the analysis, diagnosis and consideration of these peoples' circumstance, and provides for a nonlitigation compensation without some of the usual defenses. Particularly, the problem of proving causation as there is in some of these asbestos cases.

From the — so you could say that it provides a kind of structured settlement in terms of a payment schedule for these folks.

From the point of view of the defendants, it precludes punitive damages, which is a very uncertain and sometimes risky exposure. It provides for a pacing of the [Tr. 22] flow of claims. It's a flexible flow so to speak, but is designed to keep the line moving along in a orderly way.

It relieves these defendants from the expense of litigation, and the costs of defense and the uncertainties in terms of range of liability, and particularly the risk of a big hit of some sort.

It allows the defendants to therefore to plan their financial future in a more predicable, stable way, which in the case of business enterprises is very important, because it allows them to make their business plans with an eye to these responsibilities. And in my opinion, that has very great practical significance, from the point of a business person.

And considering it from the point of view of both sides, as I interpret it, it has the effect of reducing the transaction costs, which is a nice name for lawyers' fees and litigation expenses, that would be incurred on both sides. So, in that respect as it were, puts money on the table for the injured folks that otherwise would have to be expended in the tort system process.

At the same time it obviously leaves these claimants free to — leaves the futures claimants free to pursue their tort remedy against other people, who aren't covered by this agreement. So that they're not wholly outside the tort systems, as vis-a-vis other people. I think those are the [Tr. 23] main elements of this agreement.

Q. And what do you understand is the overall purpose of the settlement?

A. Well, I think that the basis idea is to have some stable, less expensive, compensation arrangements. Less expensive in terms of transaction costs. Compensation arrangement that has rational criteria for — of making compensation payments. And that treats, members of this defined class on an equal basis so they get equal treatment rather than being subject to the vagaries and discrepancies of outcome that can be incurred in a tort system.

It reduces somewhat the cost to them as a group in terms of the litigation expenses that I have referred to. It reduces the defendants' costs — counterpart costs, and it I think provides in a sense peace of mind in the sense of eliminating uncertainty on both sides.

Q. Based on the materials that you have read, that you have already described to the Court, do you have an understanding as to when the settlement negotiations for global resolution of the asbestos issues started?

A. Well, having regard for the testimony of Mr. Fitzpatrick, since 1987 I have to say, based on my own knowledge of the background, I think thoughts of some kind of way of dealing with the problem obviously antedated that but he says, and I am hence thereby informed that discussions looking to some [Tr. 24] kind of an arrangement for settlement on across-the-board basis, he testifies, began in 1987. I think he said specifically discussions of an exploratory sort were held with Mr. Motley at that time and I believe that a number of people have — from that point — from thereafter, many people, judges and lawyers, academics and so on had commented on the idea and I think that given this is sort of an open forum, that continued the discussion that he says originated in 1987.

Q. Do you have an understanding as to whether those negotiations included a discussion of settling pending cases or future cases or both?

A. Well, I understand from his testimony that it was always on the agenda that you'd have to look at futures cases and pending cases. Obviously plaintiffs and their lawyers are immediately concerned about pending cases. I think conscientious plaintiffs' lawyers were concerned about futures cases. They knew there were going to be more cases coming the line.

Obviously the defendant has got the pending cases right before it and is expending whatever it takes to respond to those cases, so those cases are of concern to it and obviously a business person, and all the defendants are businesses, and their insurance companies, has to look down the road of where's this going to go, what is the future for [Tr. 25] us?

So if they were behaving rationally on both sides, they would have to be thinking about, as I take it all humans do, now and tomorrow. And that's present and future.

Q. What do you understand the role of the firm of Ness, Motley to be in these negotiations?

A. Well, my understanding of Ness, Motley is one of the leading firms in this field and that Mr. Motley was engaged in — as a primary participant, discussant in those negotiations as they went on intermittently.

MR. BARON: Your Honor, I didn't get a chance to insert an objection there. I wanted to limit the question. I object unless the question is limited to his knowledge based on what the testimony that he described earlier that he had read as opposed to his own independent information. I think the question wasn't properly formed. I think what she intended and I think that's what he answered.

THE COURT: Well, I inferred from the answer that he referred to the testimony.

MR. BARON: Right.

THE COURT: I didn't hear him refer to anything else.

MR. BARON: Well, the question wasn't phrased to ask him to only refer to the testimony but I believe that's what he's been doing and I wanted the record to be clear that he [Tr. 26] is referring — the information that he's reciting is based on what he has read as opposed to his independent information.

MR. MOTLEY: Excuse me, your Honor.

THE COURT: I don't know if he did an independent investigation.

MR. BARON: I don't either and that's why I wanted — that was the purpose of the objection to the question. The question wasn't limited again as she limited the other questions to based on what you have read.

MR. MOTLEY: May it please the Court, may I comment, or I'll sit down, whatever you please.

THE COURT: Well, first — Mr. Motley, the witness is being presented by a lawyer. That lawyer is handling all the objections. So it's the only way we could proceed otherwise the questioning lawyer is distracted by another lawyer making an objection about a matter that she's presenting and she chose the language and I'd like to hear it from her, please.

MS. WHITE: Your Honor, I'm not sure I understand Mr. Baron's objection. Professor Hazard testified as we began that he has some experience and knowledge in the asbestos litigation. He is going to be offering an opinion on ethical issues from — and he

will base that opinion on information that he knows. He can't exclude that from his [Tr. 27] knowledge and what he has read.

If Mr. Baron was asking whether he did some independent investigation, I think that Professor Hazard will tell you he didn't do that, but his answers to these questions have to be based on what he knows.

MR. BARON: Well, your Honor, that again goes to the heart of my objection and I think that we're all on the same boat —

THE COURT: Wait a minute. I don't know what we're doing here. We have a question, we have an answer, then you stood up to make an objection on something —

MR. BARON: I didn't give my —

THE COURT: — that's already happened.

MR. BARON: Right. I didn't want to interrupt. And the witness answered before I could insert my objection, your Honor.

The objection was that the question wasn't properly limited as the prior questions had been properly limited to his giving testimony based on what he had read in the discovery material in this case.

THE COURT: Well, I don't know that he's so limited.

MR. BARON: Well, the prior questions had asked him —

THE COURT: I don't care about prior questions. I don't believe the witness is so limited. There then may be [Tr. 28] other things that I haven't heard about yet because I never read his deposition and —

MR. BARON: Well, then I would object based on lack of foundation because there's no foundation that he would know any of this material without relying exclusively on the prior material, your Honor.

THE COURT: Well, his objection to a question that's been asked and answered is overruled. If I rephrase it to a motion to strike, the motion to strike is denied and if the questioning lawyer wants to straighten this out, she may try to do that and if it isn't straightened out, you can do it on cross-examination or objecting to another question.

MR. BARON: All right.

BY MS. WHITE:

Q. Professor, had you finished your answer?

A. Yes.

THE COURT: Wait a minute. Fine. I'm glad he said that. Because the question's so long gone that we won't know what he's answering. Ask another question, please. I'll speak for myself. I wouldn't know what he's answering.

MS. WHITE: All right.

BY MS. WHITE:

Q. Professor Hazard, what do you understand the role of Greitzer and Locks to have been in the negotiations that led up ultimately to the Georgine settlement?

[Tr. 29] MR. BARON: Your Honor, once again I'm going to object on foundation unless —

THE COURT: Yes. I sustained.

MR. BARON: Thank you. Oh, I'm sorry.

THE COURT: Objection sustained.

Ms. White, I think you have to —

MS. WHITE: I'll rephrase the question.

THE COURT: Heaven knows where that question would allow him to go. I think there's some merit to what counsel said but manage it that way to get that behind us and manage better what we're doing now.

BY MS. WHITE:

Q. Professor, based on the materials that you have read in preparation for your testimony and materials that you are familiar with that you have already described to the Court, do you have an understanding of the role of Greitzer and Locks in the settlement negotiations that ultimately led to the Georgine settlement?

A. I think I do.

Q. And what is that understanding?

A. That when this case — that the negotiations leading to this settlement emerged from the MDL assignment of these cases here, that the MDL assignment of these cases here after the cases got here involve a designation of two plaintiffs' law firms as, I will call them, leaders in the discussions [Tr. 30] that were to be conducted or being conducted and one of those firms was Ness, Motley and the other one was Greitzer and Locks.

So they were the lead firms in the matters proposing in this Court at this time.

Q. And what do you mean when you say they were the lead lawyers? What are you referring to?

A. Well, that they were designated by the Court as primary spokespersons to the Court with the attendant responsibilities of lead counsel, vis-a-vis, the other lawyers on the plaintiffs' side for the management of the affairs being conducted in this MDL proceeding which as I understand it was — could be characterized as an extensive kind of settlement conference.

So that's what I understood they were recog — they were recognized by the Court as having that position and they carried it out.

Q. Professor Hazard, as you know, under Rule 23, one of the issues that the Court must address in this proceeding is the adequacy of counsel in negotiating the stipulation of settlement.

Given your understanding of the history of the asbestos litigation and the role of class counsel in this litigation, based on the materials that you have read and already described, given your understanding as to the process [Tr. 31] of the negotiation, also based on those materials, and given your expertise in the field of legal ethics, do you have an opinion as to whether class counsel here acted in a manner consistent with their ethical obligations?

A. Yes.

Q. What is that opinion?

A. In my opinion, they — judged by what they have done as I have understood it from the materials you talk about, they carried out their representation with intelligence, based on informed experience, with focused concern for the interests of the clients and

diligence and energy. So I think they met the — the standards that you would hope for in counsel and met them clearly.

Q. Do you have an opinion as to whether or not in negotiating the stipulation of settlement, there were any impermissible conflicts of interest which would disqualify them as class counsel in this case?

A. I have an opinion on that subject.

Q. And what is your opinion, sir?

A. I do not think they had a conflict of interest that impaired their ability or in any way disqualified them from performing the functions that they performed.

Q. And what is the basis of that opinion?

A. They represented a proposed class. I say they spoke on behalf of a proposed class in a strict and proper sense. [Tr. 32] There was no client until, and will be no client, until the Court takes official action to recognize the set of people or the group of people as a legal class.

A class suit can be proposed, it can be filed but it doesn't exist as a legal entity and therefore you don't, strictly speaking, have a client until it's — the lawyers are recognized as having that capacity by the Court.

Nevertheless, they undertook the kind of responsibilities that one undertakes for a client. I think that they understood a fiduciary responsibility to these people, even though in a strict sense the futures class was not — were not clients for the reason I just stated.

And the question is whether it was improper for them to undertake to act in behalf of the futures class for the reason that these lawyers also represented claimants with pending claims which I will call the inventory or pending claims, meaning claims that had been either filed in court or in which they had office files of clients who had come to see them or had been referred to them by other lawyers as was the case in many instances as I understand it.

So the question is whether a lawyer for more than one plaintiff may proceed to negotiations on behalf of one client, here the futures class, when it is the case that the lawyer or law firm concurrently represents another client who was injured or suffered

injury by a course of conduct similar [Tr. 33] to or identical with that injured the first client.

That is, you can think of these as two great big groups but I think that if you look at the group of futures as a client for purposes of analysis and look at the pending cases as a client, then the question is it permissible for a law firm to represent two clients, both of whom have been injured in a similar course of action or the same course of action when those clients may have somewhat different bases of claim against the common defendant.

And my view is that is not an improper conflict in the absence of any showing of a specific wrongdoing, vis-a-vis, one or the other of the clients.

And indeed, it happens all the time and a simple illustration to show that is as follows: Suppose that a parent, husband and wife, are driving in an automobile with a child or two children in the back seat and suffer a severe collision and assume that the wife is driving and the husband is in the passenger seat and the husband is the registered owner of the car. And the children are both minors.

In normal tort law, it is possible that the wife's claim would be subject to some reduction under the principles of comparative negligence if it could be shown that the way she drove was negligent.

Furthermore, it is possible in some states that negligence would be attributed to the husband as the owner [Tr. 34] under principles of vicarious attribution.

But as I understand tort law, at least in many states, if not all of them, that the children would not be — have their claims subject to attributed comparative negligence of either of their parents.

And so that the legal bases of the claims of the members of the family would be somewhat different. Plus of course the problem of what would be an appropriate amount of money and type of settlement for them might be different.

In the case of children these days, very often one has a structured settlement so that you build a system of long-term payments and sometimes these days even a kind of a look-see or second look in terms of medical benefits. The point being that the

concept of damages and the principles of redress that would cover the two clients could be different.

And yet, given those differences, I think it is not a violation of 1.7B of the rules which is the rule that's involved here, not a violation of the traditions of our profession.

To the contrary, I think it's widely recognized that it's quite appropriate for a plaintiff to represent all the members of the family. And you would not say, I certainly wouldn't say that there was a conflict of interest in representing the children because the plaintiffs' lawyer also represented the parents in that situation.

[Tr. 35] Now, it requires the lawyer to exercise proper judgment and fairmindedness in working out the negotiations concerning allocation of any settlement but that's part of the job. It doesn't mean you're out of the job.

And so I think that this case, as indicated by that illustration, is simply a large scale complicated version of concurrent representation that is very familiar and well-recognized and completely ethical.

Q. Professor, have you had an opportunity to analyze the objections raised here based on ethical conduct and adequacy of class counsel?

A. Yes.

Q. And how would you characterize the objections? Have you analyzed them?

A. Well, in trying to define my own response, I think that there are — there's an objection that the settlement is tainted because the lawyers in conducting, the lawyers on behalf of the plaintiff have violated professional ethics. I've just referred to one aspect of that.

And secondly, the view in the terms of the settlement substantively, what it provides for, that the settlement is unfair.

Now, I do not consider my province to examine in detail the unfairness question. I understand the Court has a procedure in place whereby that will be examined.

[Tr. 36] I did review the stipulation with this question in mind. Is there anything in here that is indicative of unfairness that would

lead to the inference that there was a conflict of interest or some kind of collusion or something bad that produced it.

So I was reviewing it as it were, as an indicator of suspicious things. Were there any suspicious indicators there and I didn't see any. I don't purport to know the appropriateness of the medical criteria, for example, and it may be that those are inappropriate criteria. So I don't want to suggest that I can affirm that it was fair. All I can say is, I didn't see anything that pointed, from the basis of my knowledge to the contrary.

Now, with that in mind, the essential objections that have been made are a conflict of interest to which I've referred to generally.

Secondly, that there is a violation so it is said of Rule 5.6 concerning a restriction on the right to practice law, and finally, there is an assertion that there was or must have been collusion. That is, essentially the plaintiffs' lawyers were guilty of fraud in the way they conducted the negotiations.

That I think is the essential contentions that are made.

Q. Do you believe, Professor, that any of these three [Tr. 37] contentions are soundly based?

A. No.

Q. Professor, I would now like to analyze each one of those issues that you just identified for the Court.

Let's look at the first objection that you described, that is the contention that there is a conflict in representing present claimants while negotiating for the future. Are you familiar with that objection?

A. Yes, sir — Yes, ma'am, I'm sorry.

Q. What responsibilities if any did Messrs. Motley, Rice and Locks have to members of what became the Georgine class when they pursued the negotiations of Georgine and the global settlement?

A. Well, I think, as I said, I do not think in a strict sense they have a "client" at that point for the reasons stated.

I do believe that undertaking to do what they did, entailed what I will call basic principles of fiduciary responsibility. There's nothing mysterious about that term. Its basic elements are loyalty

to the purposes of the person on behalf of whom you're purporting to act, and reasonable care and diligence in carrying it out.

And judge by those standards, in my opinion they conducted themselves appropriately. The indication from the testimony of Mr. Fitzpatrick is that the negotiations were [Tr. 38] extensive induration [sic] and intensity, which indicates that this was deliberately and pursued over a sustained period of time which would allow opportunity for reflection and deliberation and assessment.

There is indication that very careful attention was paid to the financial aspect of it, so far as the defendants' providing the flow of money necessary to make this thing go. The terms of it indicate that the attention was paid to the individual interests, providing for examination and reexamination and so on of the claimants.

So it seems to me from what one can tell, looking at the agreement and what evidence is available about how the process was conducted, that they fulfilled the duties of competency, diligence and loyalty in carrying them out.

Now, there is a contention made that it's a kind of further detail about the so-called conflict of interest, in that the terms proposed in the stipulation, so far as the futures are concerned, are not identical with those so far — involved in the pending cases.

But a point is, that the pending cases are conclude folks who have already incurred the transaction costs of engaging a lawyer on whatever the contingent fee is. In most instances, in filing suit and entering the — and the cost of entering the tort system, getting medical testimony and so on, so that I would have thought that you would have to take [Tr. 39] account or certainly legitimately take account of the fact that the pending cases or inventory cases were in general, in certain respects are somewhat different.

So the fact that the terms might not be identical, I don't think is indicative of conflict of interest. Indeed if it's — it could easily be indicative of attentiveness to this kind of difference.

So if you look at it in those terms, I do not see an inappropriate conflict of interest. Perhaps I ought to stop there and say, if you wish me now to talk about the so-called — the restriction on practice of law, I will do that.

Q. Professor, before we get to that point, would you turn in your book to Page 11 of the report of Professors Krampton and Coniac, and look at Paragraph 23?

A. Well, I'll see.

THE COURT: Is that an exhibit somewhere?

THE WITNESS: I see —

MS. WHITE: Your Honor —

MR. BARON: Yes, your Honor, it's a —

MS. WHITE: — it is not — excuse me.

MR. BARON: I'm sorry, it's an objectors' exhibit.

THE COURT: I'm asking Ms. White, is this an exhibit that's been marked for identification or —

MS. WHITE: Your Honor, when I was putting my book together last night, I realized that their expert report has [Tr. 40] not been listed as an exhibit, and I don't know how to work with the witness without it.

THE COURT: I'm not saying it should be. I just want to know how to find one.

MS. WHITE: It's in your book, your Honor.

THE COURT: The daily book you've given me?

MS. WHITE: The book that I provided for you.

THE COURT: All right.

MR. BARON: Is this the one that's under tab Krampton, Coniac report?

MS. WHITE: Yes, sir.

THE COURT: January 31, 1994?

MS. WHITE: That's it.

THE COURT: Thank you. Would you get us back to Page 11 and what part of it please.

MS. WHITE: Paragraph 23, Page 11.

MR. BARON: Your Honor, for identification purposes, perhaps we should mark that as the next exhibit number.

Apparently we —

THE COURT: All right. Would it more likely be an objectors' number?

MR. BARON: It would be an objectors' number, and I've noticed that apparently inadvertently it was left off.

THE COURT: What's the next number, 67?

BY MS. WHITE:

[Tr. 41] MR. BARON: It's a great one to leave off. 67.

MS. WHITE: We thought maybe you weren't going to offer it.

THE COURT: 67.

MR. BARON: We'll call it O-67.

THE COURT: Objector's 67. Okay.

BY MS. WHITE:

Q. Professor, could you tread [sic] the last sentence of Paragraph 23. Why don't you read it out loud so we all know where we are?

A. It states, this is Paragraph 23 on Page 11, second — third sentence.

"We believe that Messrs. Locks, Motley and Rice breached their responsibilities to the class under Model Rule 1.7B when they presumed to negotiation of the rights of class members, while concurrently representing individual clients with pending claims against CCR."

Q. Now, I take it from what you just testified, you would disagree with that statement, is that correct?

A. I do indeed.

Q. Professor, when you reviewed the testimony of — the deposition testimony of Professor Krampton, and when I asked him about this subject, do you recall what his response was when I asked him the following question and you can follow along.

[Tr. 42] MS. WHITE: Your Honor, it's in your book for today, Page 54 of the Krampton deposition, it's the last —

THE COURT: I have it, thanks.

MR. HENDERSON: Your Honor, I have no — you get a book and nobody else does, because it seems to me that I ought to have the opportunity to know what's being used, and counsel didn't do that. I don't have the Krampton deposition.

THE COURT: I asked counsel to and all counsel to give me exhibits they're going to use. I've asked you, I've asked everybody to give exhibits they're going to use with witnesses, so I don't have to dig in the books. That's all.

MR. HENDERSON: I understand and I think that's appropriate.

THE COURT: And I've done it privately so that there's no diminution of the tactical concepts of how counsel's putting their examination together. But these are not secret exhibits.

MS. WHITE: No, sir, they're all in the record.

THE COURT: We're just doing this to save time, Mr. Henderson.

MS. WHITE: I don't think it's a surprise that I'm using the deposition of Roger Krampton.

MR. HENDERSON: Well, would you wait a moment please.

[Tr. 43] THE COURT: Sure.

(Discussion off the record.)

THE COURT: Most trial counsel have available to them the matters that will come before them that day, and I try as well. But I don't know what counsel may be up to.

MR. BARON: 36 depositions, your Honor.

MR. LOCKS: Yes, but there's only five mini-scripts of ethics and they only take that amount, and they're in a folder and I have them and everyone else has them. That's — sorry.

THE COURT: There's no — no inappropriate procedure going on here. It's just a matter of logistics.

(Pause in proceedings.)

MR. HENDERSON: What page are you on?

MS. WHITE: I'm going to read the question and the answer on the bottom of Page 53 to 54.

BY MS. WHITE:

Q. Professor Hazard —

A. No, no.

Q. — I asked —

A. Oh, you're asking me now —

Q. Yes.

A. — what you asked Professor Krampton.

Q. I'm going to read it and then I'm going to ask —

A. All right.

[Tr. 44] Q. — you to comment.

A. Okay. Thank you.

Q. I asked Professor Krampton, "Am I right, that given your understanding of CCR's posture with respect to the settlement of future claims, that no plaintiffs' lawyer who had any existing asbestos cases negotiate a Carlough deal without having an impermissible conflict of interest?"

Professor Krampton answered, "I was assuming that qualification. It would have been very easy for Mr. Locks to have turned over his cases and Greitzer and Locks to turn them over to another law firm. He would have had no existing cases. He then could purport properly to negotiate the interest of classes of future claimants in a way that would look after their interest in a single-minded way."

Do you have any opinion as to the necessity or practicality of Professor Krampton's proposed solution here?

THE COURT: Finish reading the answer please in its entirety so that there's no question about it.

MS. WHITE: Oh, I'm sorry.

THE COURT: Because you're getting into some of the areas that commenting on without the rest of the answer.

MS. WHITE: Yes, I'm sorry.

BY MS. WHITE:

Q. And if the answer is, "Well, there are no lawyers in the United States who know anything about mass torts, or could [Tr. 45] serve as class counsel will in this case, who don't have asbestos cases, I think the proposition is absurd. It's not true. Of course, all we've been saying only goes to one of the conflicts of interest."

What is your view about Professor Krampton's solution, his view of the conflict and his view of the solution?

A. I do not believe that one is required to drop a present client in order to represent another client, here a future's client, who has a similarly caused injury in a similarly caused course of action. I don't think there's any standard of ethics that requires that, indeed quite the contrary. It's very common for a plaintiff to have one — or a plaintiffs' lawyer to have one or two cases arising out of a transaction for example, a bus crash or something like that, and then that other cases come into the office. And the notion that you would have to drop the first cases in order to take the second cases is just totally inconsistent with recognized practice.

I might say it's also not to the advantage of the clients, because one thing the lawyers gets from already having a case, and here we're talking about thousands of cases over time, is familiarity with that type of case. The facts, the legal theories, the likely defenses and so on.

So A, there's no conflict, and B, I think in many [Tr. 46] situation [sic] it would be a positive disservice to the client to try to drop one in order to take the other.

Q. Professor, do you understand that in this case, the defendant CCR companies made it clear that they were only prepared to settle present inventories if class counsel would do something, would make some agreement — reach some agreement as to a procedure and approach for handling future cases. Does this settlement posture affect your view of the conflict?

MR. BARON: Your Honor, I object. It's leading and there's been no foundation, and I don't believe that (inaudible). But certainly —

THE COURT: I certainly accept the leading and the question doesn't incorporate what knowledge he's referring to when he perceived to answer it.

MS. WHITE: I'll rephrase the question.

BY MS. WHITE:

Q. Professor Hazard —

THE COURT: The objection's sustained, if I didn't say that.

Q. Would you turn to Page 11 of the report we just marked Objector's Exhibit 67, and turn to Paragraph 24.

(Pause in proceedings.)

Would you read the first and second sentences of that paragraph?

[Tr. 47] A. I've read the whole paragraph.

Q. All right. Would you read for the record the first and second sentences.

A. "At some point in 1992, CCR made it clear to Messrs, [sic] Locks, Motley and Rice as well as to other lawyers representing clients who had filed claims against CCR that current legal proceedings on behalf of current asbestos clients would not be settled until or unless agreement was reached concerning alternative dispute resolution procedures for handling future claims. See Exhibit C.

From the moment CCR adopted this posture, a conflict of interest arose between the interest of the present clients, represented by Locks, Motley and Rice, and the future clients who are now before the Court as a class."

Q. Do you agree or disagree with this statement?

A. I entirely disagree with it.

Q. And what is the basis of your disagreement?

A. Typically in my experience as a practicing lawyer, going back years ago and presently as a consultant, defendants do not settle cases against the same lawyer involving similar or the same transactions unless they will settle them all, except under extraordinary circumstances.

The reason is, that the defendant still has the transaction cause, the certainty and so on in dealing with the transaction. You want to get it cleaned up if you can.

[Tr. 48] Now, there are some times you can't do it, but that is the base line approach that defendants take for perfectly sensible reasons, and their lawyers advise them that is an appropriate strategy and cases are settled like this all the time.

My family case is an illustration. The bus case is another illustration. It's an entirely familiar practice. And if this contention here is correct, then any time you had two clients, doesn't make the difference if they're present and future or that they're class if you have two clients whose interest [sic] are being settled at the same time, there would be an impermissible conflict and that's simply not the law or the practice.

Q. Professor, I believe that you testified that you read Professor Coniac's deposition?

A. I did.

Q. Do you recall in that deposition a discussion with Mr. Motley about issues related to the settling of the inventory cases as to whether or not the cases were filed or unfiled?

A. There was some discussion as to whether all of the inventory cases were filed cases, or included some cases that had not been filed.

Q. Do you have an opinion as to whether or not the settling of inventory cases which may have included some cases which were ready to be filed but had not been filed, raises an [Tr. 49] impermissible conflict?

A. No. It's often the case — I mean it easily be the case that you have arising out of the same transaction or related transactions, one plaintiff for whom you've got a case on file, and another for whom you do not have one on file.

I again go back to my husband and wife and child case. It might well be that a plaintiff's lawyer would file on behalf of the parents, because he's very mindful of the statute of limitation, but not file presently on behalf of the child, because the statute of limitations in most jurisdictions, if not all, does not begin to run as to a child until the child reaches majority. And you want to wait

and see whether the child is responding to medical care or the injuries have stabilized or whatever.

It could well be that the case was not on file, but you then saw that the — the plaintiff's lawyer then sees that its [sic] reached a sufficient condition of stability to be appropriate for settlement, and you call up the defendant and say let's settle the cases that are on file, and we're ready to talk about the youngster's case as well.

You don't have to go ahead and file that suit in order to settle it. You may have to have an application to the Probate Court or the like to get court approval of settlement, but you don't have to file the suit as such in order to make it eligible from an ethical point of view to [Tr. 50] talk about — in regard to settlement.

If that's true, and that's very perfectly okay as far as I know under standard ethical conceptions. I don't see why it is inappropriate to settle cases you've got in the office, some of which have been filed in court, and some of which haven't.

And I might add there is at least one state where you don't file the case properly so-called, until you get along through discovery or have some kind of motion, and that's New York. You serve first and maybe later file. A lot of cases never are filed.

Q. Would your view change, Professor, if the lawyer that you were just describing was at the same that he or she was concerned with the settlement of those cases, was also considering — or was also in the process of negotiation with the same defendants for the settlement of future claims?

A. No. That really raises the question, whether it is proper to have a settlement of claims of a future class. That goes really to a question of class action law and practice. I regard that as a question of law for the court.

I am assuming in this discussion that under appropriate conditions, a class action can be settled, a class action that deals with future claims. And if that's true, then it necessarily follows that futures claims can be the subject of negotiation. Because if you said they could [Tr. 51] be settled, but they couldn't be negotiated, it would be a practical contradiction.

Q. Unlike your automobile or bus example where there are finite number of clients and you could discuss with the clients, for example, all of the family members, what their options were.

When you're dealing with a class action or as I think you've described it, inchoate perspective class, you don't have the freedom, you don't have the practical ability to do that. Does that factor change your view or have any impact on your view about conflicts of interest in this case?

A. No. That is — essentially that's a suggestion that a class suit in which the identity of the specific members of the class, we'll say the beneficiaries of a settlement or a decree, cannot be now identified. That's true of any kind of class suit where that is the case.

Now, it turns out there are lots of class suits of which that is the case, for ex — not just damages class suit. But take for example the school decrees. A school desegregation decree orders that a set of described beneficiaries, all children going to PS34 in the Philadelphia school system, shall be assigned schools and classes without regard to race.

That settlement, if that's how it's arrived at, or decree — we're talking about settlement, is going to cover [Tr. 52] people whose eligibility to go to school has not yet been determined, they haven't reached age six. So by definition it's an indefinite class.

I think similarly of prison decrees. There are lots of those that say all persons who come into the prison shall be accorded the following rights, and you have a long negotiated settlement.

You can't tell who is going to be a prisoner, they haven't been sentenced yet. Obviously the ones that are already in prison will be beneficiaries, but there is a futures class there, and they can't be engaged in conversation the same way that you could engage a present class.

Now, there are classes where you have a list of all the people who nor are and whoever could be covered by the decree, and that's easier to deal with. But the fact of the matter is, that there are class settlements that cover and are designed to benefit of [sic] set of people whose constituent members are not specifically identified, and could not be now specifically identified, and

therefore people with him no one could have a conversation because you don't [sic] who the opposite number specifically is going to be.

Q. In the circumstances in the cases that you were just describing, is it the case or not that generally there is a complaint on file before an injunctive relief or consent [Tr. 53] decree or settlement is reached?

MR. BARON: Your Honor, that's three to four different questions there. I think that —

THE COURT: It's complicated to me, I didn't understand it.

MS. WHITE: Let me try it again.

THE COURT: Maybe that might influence counsel to withdraw it.

MS. WHITE: I withdraw the question.

BY MS. WHITE:

Q. Is it in your experience usually the case or not that before a settlement is reached, a complaint is on file in the kinds of cases that you were just describing?

A. You cannot have strictly speaking a class suit and a class suit settlement unless there is a case on file. And in order to get a case on file, you have to have a complaint.

Q. In this case, was there a complaint on file before the settlement was negotiated? What is your understanding?

A. No. But there has to be before what is proposed as a class in a class suit settlement comes into legal being, that's a — the resultant of official action by the judiciary.

Q. Does the fact that there was not a complaint on file during the process of negotiation, have any impact on your view about conflicts of interest in this case?

[Tr. 54] A. Not in substance. And technically as I have stated, there was not a class to be a client before the suit was filed.

However, in substance I believe lawyers seeking a negotiation, whether in this type of case or for example in an employment discrimination case or school desegregation case, in contemplation that there would be a class and a settlement, should proceed with

the kind of loyalty and attention to the interests of the class members as though they were a client, and I think counsel did that here.

Q. In your view then, would it have changed the — your analysis had the complaint been filed before the negotiations took place?

MR. BARON: Your Honor, I'm going to object because she's not asking for his analysis of what?

THE COURT: The only issue on which he's been testifying out of the — that is the ethical consideration. I assume that's what you're talking about?

MS. WHITE: Yes, your Honor.

THE COURT: Counsel — Mr. Baron, I assume that's what your objection is talking about.

MR. BARON: Yes, I didn't know what she was talking about.

THE COURT: The objection is overruled. The only analysis he's giving is an ethical analysis, and that's what [Tr. 55] she's asking him about.

If you remember the question —

THE WITNESS: Yes, sir, I do.

THE COURT: — you can answer it.

THE WITNESS: Yes, thank you.

It seems to me that the — at the moment after filing, if the sequence was file, no certification yet, then settlement negotiations and settlement proposals, still no certification yet, strictly speaking the plaintiff's lawyer has offered himself or herself as the lawyer for a prospective class.

But it's just sort of a self-nomination. Nobody has been elected yet because the only person empowered to elect, select, designate, appoint, confirm the existence of the class, and hence the client is the court.

That said, I believe, that the lawyer bringing such a suit assumes responsibilities to this group as though they were a client. I think at that point they are substantially a client in the sense they might be disestablished as a client if the court doesn't approve the

certification, doesn't certify it. But I think from that point forward, it's in the hands of the court and the lawyer should proceed as though he has a client, and I think lawyers do.

BY MS. WHITE:

[Tr. 56] Q. Professor, would you now turn back to the report, and I'm looking at Paragraph 44, Page 25.

THE COURT: Objectors' 67?

MS. WHITE: Yes, sir.

THE WITNESS: I'm sorry, ma'am, page?

BY MS. WHITE:

Q. I'm looking at Page 25.

A. Yes, ma'am.

Q. Paragraph 44.

A. Yes.

Q. The last two sentences which begin "Although class representatives"?

A. Yes.

Q. Could you read those last two sentences for the record, please?

A. "Although class representatives do not have total control over class counsel, they're entitled to be consulted about conflicts of interest of class counsel, and steps that are being taken on their behalf. In this case they appear to be figure heads [sic] who were selected late in the date and told virtually nothing about the case, not even in some cases that a stipulation of settlement was filed at the same as the class action."

Q. Do you understand this proposition to be one of the bases for the analysis for the views of Professor [sic] Coniac and Krampton?

Tr. 57] A. They assert it as propositions of fact.

Q. Do you agree or disagree with those statements?

MR. BARON: Your Honor, I object unless she says whether he's disagreeing with the factual basis or the legal basis. If it's a factual basis, then we have another objection.

THE COURT: Let me just read it again to myself.

MR. BARON: Sure.

(Pause in proceedings.)

THE COURT: I'll sustain the objection and see if counsel can rephrase.

MS. WHITE: Let me ask the question this way.

BY MS. WHITE:

Q. Do you agree or disagree with the legal analysis about the role of class representatives?

A. Well, I certainly agree with the first proposition although class representatives do not have total control over class counsel. That's absolutely right.

That is, the class representatives can't tell the class counsel for example, defendants offered me $50,000, I want to take it and run, and you dismiss the suit. So you don't have — although an individual plaintiff could tell a plaintiff's lawyer I want to settle for 50,000 and that's that.

The class does not have that legal authority because [Tr. 58] they have representative responsibilities. It is also a fact that in many class suits, particularly those dealing with a large number of people who are not a pre-existing body, that is like members of a church or something like that, some pre-existing unincorporated group, and particularly when you're talking about people who are dispersed in their location, and maybe not all college graduates, effectively class counsel as distinct from the class representatives, has much heavier responsibilities in terms of initiative and formulation of strategy and conduct in negotiations and so on.

So realizing that statement — what I have just said is consistent with that, I agree with that part. I think it doesn't go far enough.

They are entitled to be consulted about conflicts of interest of class counsel. I think they are entitled to be informed in an appropriate way. But I point out that in the kinds of institutional decrees I have been talking about, there is no way that some youngster who is going to go into the eighth grade in a school desegregation case can have been told about supposed conflicts of interest on the part of the lawyer that's representing the class.

And when you're talking about a substantial size class, particularly one that's dispersed, again not having some pre-existing organizational connection to each other, that's simply not possible, and therefore I disagree with the [Tr. 59] statement that they would be entitled to be informed in the same way that a one-on-one single represented client is consulted.

And the same point holds about steps being taken on their behalf.

MR. BARON: Your Honor, I object to the answer, it's not responsive and I move to strike because it talks about class representatives, not class members, and he was referring to class members, unknown class members.

THE COURT: The motion to strike is denied. If it's not helpful to the proponent or the witness, then it's not helpful.

BY MS. WHITE:

Q. Professor, you may in your testimony, although —

A. Well, let me just add this point.

I think that the class representatives confront of the same kind of problem. The question is, what is appropriate to inform them given the responsibilities that are involved in a class suit.

And I think one of the important points about a class suit is the court's supervision is now going on, so that we're not limited to the kind of disclosure that a lawyer makes one-on-one. It's a much more public kind of process.

Q. Do you have an opinion, Professor, as to the appropriate [Tr. 60] role of class representatives in this litigation?

A. Yes. I do. I do have an opinion on that subject.

Q. And what is your opinion?

A. Well, I think they demonstrate, their presence demonstrates that there's a real injury here, a real legal basis for redress of a set of people, that they have an understanding that their rights are being involved in this case and in the settlement, that they have an understanding generally of the concepts that are involved in the settlement and have reason to feel confident in the technical expertise and integrity of their lawyer.

When you get a complicated stipulation, and this thing is a — more complicated than some bond issues that I've written — or read, there's no way that a class representative could understand and detail the literal terms and significance of all the provisions of that agreement. That's why we have a hearing.

Q. Professor, do you have a view as to whether or not if the analysis contained in the report that we've just been looking at, Objectors' Exhibit Number 67, were correct, would it have been possible for any lawyer to have represented the class in this case?

A. No. Not possible. There's no way you could meet the standards that they're talking about in terms of communication.

[Tr. 61] Q. And with respect to generally the conflict of interest as analyzed by Professors Krampton and Coniac, the simultaneous representation of present and future cases, is there any lawyer who could have come into this Court and been class counsel without having the conflicts discussed in this report?

A. Well, I think it's possible to imagine a lawyer coming in, purporting to represent the class innocent of any prior encounter with asbestos litigation who therefore would be clearly free of conflict but it's hard to see how any such lawyer could possibly provide adequate representation given the difficulty of this kind of litigation.

So in a sense, according — I think to their analysis, you could have loyalty but not adequacy or adequacy but not loyalty. And I just don't think that the rules of ethics operate with that constricting effect.

Q. I'd now like to turn to the second objection that you identified earlier in your testimony, the objection that dealt with Model Rule 5.6.

Would you start, please, by explaining to the Court what Model Rule 5.6 provides?

A. This is one of the rules concerning the practice of law and it states a lawyer shall not participate in offering or making, and then the relevant part is, B, an agreement in which a restriction on the lawyer's right to practice is part [Tr. 62] of the settlement of a controversy between private parties.

And then the comment states, Paragraph B, prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Q. Thank you. If you would turn in your book to Settling Parties Exhibit 302A.

MS. WHITE: Your Honor, the pages that I'm going to use are in your book, not the entire exhibit.

THE COURT: Will you describe it for counsel so they know what you're talking about.

MS. WHITE: Yes.

It's 302A and it's CCR 2000362.

THE COURT: It's entitled CCR Settlement Agreement. It's entitled CCR Settlement Agreement.

MS. WHITE: CCR Settlement Agreement but there are many of them, so I was identifying which one it was that I was using.

(Pause in proceedings.)

BY MS. WHITE:

Q. Professor, I would also at the same time like you to turn to the next exhibit in your book which is 302C. It is a letter dated August 3rd, 1992 from Gene Locks and it's identified in the record as CCR 2000530.

A. Yes, ma'am.

Q. Professor, have you seen these two agreements before?

[Tr. 63] A. Yes.

Q. In your opinion, Professor, do these agreements or any provision in these agreements violate Model Rule 5.6?

A. I do not think they do in the circumstances of this case.

Q. And would you explain the basis for your opinion?

A. Well, the first point is that as I understand it the two agreements that are mentioned here have to do with so-called pending or inventory cases, not as such the futures cases that are the subject of this class suit. But the suggestion is that because the settlement of the pending cases was a part of the negotiations or concurrent with the negotiations, that it is relevant to the question

of the class suit. I think my understanding is correct in that respect.

Now, on that understanding, I am correct that the CCR settlement agreement is an agreement about the pending cases and is not the stipulation concerning the futures class. Am I correct in that?

Q. Yes, sir, you are.

A. Yes, I thought I was.

Now, so my initial question is why is there any objection concerning the futures class that's based on an agreement counsel made concerning the pending cases and as I understand the contention it is, is this, that there was an improper agreement concerning the pending cases and an agreement that in the future those pending cases would be [Tr. 64] handled in a way that is indicated in this agreement and that either contaminates the futures agreement or somehow shows that the futures agreement is improper.

I must say I'm at a loss to understand what the logic of that contention is, but assuming that contention in its own terms made sense, then the question is in this context, is it inappropriate for counsel to make this kind of agreement, that is, counsel who handles — has been handling a whole bunch of these cases over a long period of time has a substantial inventory of them is negotiating a futures agreement which if the futures agreement goes into effect will cover cases that later — that come within the terms of that so that if the futures agreement does go into effect which counsel can't predict because it requires this procedure and ultimate court approval, but in the event that this agreement does not come into — does come into effect, it will cover the situation.

So this is in a sense against the contingency that the futures agreement won't come into effect. And speaks to pending cases.

Now, is it inappropriate for a lawyer who has a whole bunch of cases and contemplates a continuing flow being asserted against a defendant to say it's our understanding in our professional judgment that these pleural cases, the ones with the lung marker, shouldn't be filed and — but the kinds [Tr. 65] of claims we're

going to make are as stated in these criteria. And that's how we propose, we agree that we will handle futures cases.

I think that the net value of that, net effect of that is not a restriction. It does say something about how we're not going to prosecute pleural cases but it says something affirmatively about the standards that will apply to the cases the way we'll prosecute and that seems to me to say to the prospec — to this set of defendants, we're going to apply these as our claims screening procedures.

Plaintiffs' lawyers always have some criteria for assertion and this is an affirmation to you that when you get these cases that we do file, they should be treated with corresponding seriousness and recognition that they have this — this standard.

Now, the question is, does that net out to be a restriction and I think if you look only at the part that says — refers to what they're going to do with the pleural cases, you could say that there was at least a nominal limitation but if you look at what the thing — how the thing would work, I think it facilitates the assertion of the other kinds of claims because it's an affirmation that you're not going to be — you, defendants, are not going to be confronted with claims whose value is primarily settlement value, that is transaction cost value.

[Tr. 66] And I think that given the situation that they were in and these experienced lawyers to whom cases are being referred because they have expertise in this field, that that is an arrangement that doesn't violate the purpose of 5.6 and in fact is not a net-out restriction so far as I can see.

Q. In your opinion, Professor, did these commitments compromise the ability of Mr. Locks, Mr. Motley or Mr. Rice to represent the futures class here?

A. Well, assuming that there were a violation which I don't think there is, I can't see that it's significant or material and that it would undercut or impair the force or clarify [sic] or loyalty with which they could act in behalf of the futures class.

Q. Did class counsel have an obligation to disclose the fact of these present inventory settlements to their future clients?

A. Well, that gets us back to this problem about what you can disclose to the futures clients under any condition. I think it is

appropriate that these matters be before the Court. They are before the Court. That the investigatory process that's going on here, having in mind the number, the dispersion, and the situation of the now specified class, again assuming it is designated as such by order of this Court, that it would be appropriate to have some kind of disclosure in my — now, whether you post a notice on the [Tr. 67] courthouse or print it in the newspaper, is a matter of — or send it to some members of the class or whatever, all those are matters of implementation that I don't purport to speak to.

I think given what is in my opinion the relative insignificance of this point that it would be a waste of time and energy to try to have some elaborate disclosure of this made to the future class members who as a practical matter I think would think that this is a pretty technical matter at best.

Q. Can you identify any adverse effect on the inchoate Georgine class that resulted from the negotiation of the provisions that you have just been discussing?

A. No. I think if it had any effect it facilitated trying to come to terms with this very difficult, very complex matter. So I don't see how it adversely affected it.

Q. Professor, let's turn to the final basis of the objection that you identified at the beginning of your testimony, that having to do with collusion. Can you describe for the Court, as you understand it, the allegations or the objection based on collusion?

A. Well, in — yes, it's a charge that the lawyers sold out the class, that they were not faithful to the interests, that — it's not just that they were — failed in energy, failed in diligence, failed in attention to specifics and details, [Tr. 68] it is that they wanted to gain for themselves something at the price of their client, that they essentially cheated their clients. I mean that's what collusion is.

And I do not see any indication in the materials I have seen to that effect. The only thing I have heard read is that lawyers representing a class are in a position if they want to to sell out a class.

Well, if they can escape the review of the Court, they might be able to do that. Anybody who's in a fiduciary position is in a

position to breach trust if he's clever enough and faithless enough. So that is possible in this unfortunate world.

But the question is, is there any indication that that happened? I don't see it.

Q. Have you read the deposition of Professor Coffey?

A. Yes.

Q. Based on your analysis of that deposition, what is the basis for Professor Coffey's view that there has been collusion in this case?

A. Well, I think, as I read it, the principal source is Professor Coffey's extensive research in the settlement and his conclusions about the settlement of stockholder derivative suits. And stock — Stockholder 10B5 suits where he has said in his observations, and I've heard him make these statements, that he thinks that sometimes the [Tr. 69] combination of the remedy and the fees indicate that the defendants have effectively bought off the plaintiffs' lawyers because the plaintiffs' lawyers get lots of money in some of those cases, so he says, and the class doesn't get very much.

I think many people credit his studies in that field. I don't think it's appropriate for me to pass a scholarly judgment on them. I think they are very serious. I think they are responsible. I think they are widely recognized as contributions to the literature.

That said, I do not understand how he crosses the bridge from a pattern he has studied in detail, that is, stockholder derivative suits and 10B5 suits to this kind of suit.

And I think the way he crossed the bridge was in terms of theoretical possibility and I agree, I've said, I think there is a theoretical possibility. What I did not see is any data to support the conclusion that the possibility actually occurred in this instance.

Q. Does Professor Coffey's analysis deal with the different treatment of pleural claims as between present claimants and future claimants under Georgine?

A. I think that that's a thing that he pointed to. I've already talked about that. That the present pleural claimants are people who have signed up with a lawyer, have [Tr. 70] got whatever contingent fee agreement they have, who in most instance haves [sic] filed. Some of them have not filed. And who have therefore

entered the tort with the hope and fears that attend that way of proceeding.

On the other hand, what's proposed here is a system that doesn't involve that kind of process, which we lawyers I might say are very used to, but a lot of laypeople regard with great trepidation. This procedure doesn't involve that kind of trepidation and, apart from the economic aspects of it, that psychological aspect.

So I think that you're — we are talking about apples and oranges. They're both things to eat. They have certainly some common features, but they are not exactly identically situated, and if that's true, then the fact that there might be some differences in the way they're handled wouldn't signify much of anything.

Q. Does Professor Coffey also have a view with respect to collusion that compares the historical settlement values for class counsels' cases with the amounts that they were paid in the pending inventory settlements?

A. As I understood his analysis, and it's a kind of law and economics analysis, it's done a lot of these days, much of it valuable, the — his view is that the cases assigned to the MDL went into a kind of purgatory or permanent — semi-permanent black hole or deep freeze from which the federal [Tr. 71] court would never release so that these cases could never be tried, so that they never had the settlement value that results from having the threat of going to trial.

And if you made that assumption, then I think you would say, if the federal courts intended to bury these cases in a deep freeze forever, then they have no settlement value.

The settlement here belies that and I might say I don't understand at all that the federal courts intend to keep these cases here without trying them and without settling them on an indefinite basis.

So I think his premise is just wrong.

Q. Professor, do you find that there was any impermissible conflicts suggested by the manner in which CCR approached Mr. Locks, Mr. Motley and Mr. Rice in pursuing the negotiations that became Georgine?

A. No.

Q. And why not?

A. If you wanted to on a behalf of a defendant to enter into the settlement, it would have credibility with the court, credibility with the class, credibility with concerned observers, public opinion in some sense. You would want to make sure that you were dealing with somebody who the court would regard as a responsible and competent representative of the interests on the other side.

It would be foolheartedly [sic] to engage someone [Tr. 72] inexperienced for a win, because you would have no assurance at the end of the day that respect would be accorded to an agreement reached for such a person, as I read this record, such as I've read.

Motley and Locks are the opposite. They are both very experienced, smart lawyers, recognized as such indeed by their peers. Who else would you go to? You can't go to everybody. You can't conduct negotiations as have been revealed by Mr. Fitzpatrick's testimony with a huge army or a very large number of folks on the other side, the negotiations break down the same way they break down among the defendants.

So if you're trying as a limited number of defendants to get some kind of an arrangement, you'd want to go to people that you think have the ability, to be credible and who have the seriousness to be willing to talk to you. They're not just going to fool around. And I understand that Mr. Motley and Mr. Locks met those criteria.

They were designated as leaders here and I understand Mr. Motley had been lead counsel or some such in a class suit down in Texas. So those are pretty good qualifications.

Q. Are you aware as to whether or not there are provisions in the settlement agreement for an oversight role or continuing oversight role for class counsel in supervising or [Tr. 73] administering the settlement?

A. Yes.

Q. Do you have an opinion as to whether those oversight functions create an impermissible conflict here?

A. To the contrary. Those are very similar. I think it's protective of the class. It means that it isn't fall — befall solely to the court or to an occasional member of the class, but befalls then responsibility for monitoring this thing. It reminds me very much of the role of class counsel in the kind of institutional decrees I have mentioned.

Indeed an aspect of judicial remedies is the problem of having somebody pay attention to whether a decree or judgment that contemplates and calls for continued conduct will in fact be adhered to. This builds it in and I think it's just carrying out the — further carrying out of the representation, like the kind you get in the kind of decrees I have mentioned, or in a commercial case where you've got a requirement that there would be payments over time, you appoint some accounting firm to keep an eye on whether it's being observed. It seems to me it's the same kind of thing.

THE COURT: Ms. White, we're at a time where we ordinarily take a recess. We're possibly behind that time.

MS. WHITE: As the Court wish —

THE COURT: Are you close to being finished with your direct or not? If it's going to take more than five or [Tr. 74] ten minutes, we ought to take a break now.

MS. WHITE: It might.

THE COURT: All right. Take a 15-minute recess.

(Recess, 11:05 o'clock a.m. to 11:23 o'clock a.m.)

THE COURT: Welcome back everyone. The witness will be seated. Thank you. Counsel you may proceed.

DIRECT EXAMINATION

(Continued)

BY MS. WHITE:

Q. Professor, before the break, I believe you were discussing the oversight role that class counsel plays under the stipulation of settlement. Could you describe generally what role, if any, the court will play if the settlement is approved?

A. Well, I do not know exactly what role. A court that enters a judgment, whether by a consent decree or some other kind of determination that calls for continuing responsibilities on the part

of one of the parties, here primarily the defendant, but obviously plaintiff class members have to take actions to be get [sic] benefits, the court has what is called continuing jurisdiction.

And how that is exercised is a matter of judicial discretion and it could range from intensive, continuous, monitoring with the aid of special master or referee and so on, on the one hand to keeping the file open and assuming, [Tr. 75] particularly here with the role of counsel involved, that attention will be being paid on a continuing basis to the implementation of this arrangement.

If disputes arise that would be within the jurisdictions of the court, then the court can respond. So this business of continuing authority is very familiar and it's a classic derivative of equitable jurisdiction which is where Rule 23 comes from.

Q. Are you aware that Professors Krampton and Coniac in their report, Objectors' Exhibit 62, have made some allegations or based their opinion on certain allegations of conflict of interest in the past by Gene Locks, one of the class counsel here?

A. I realize references have been made to that.

Q. What do you understand those conflicts to be, the alleged conflicts to be?

A. As I understand them, one arose in the court in Richmond where Mr. Locks, being trustee of a fund for payment, I think it was of Dalcon Shield claimants had disagreement concerning the question of how the money should be invested. That led to a dispute with the judge, without trying to rehearse that matter, I don't see that that was a question of legal ethics as such.

There was no claim I know of any dishonesty on the part of Mr. Locks. So there wouldn't be any implication so [Tr. 76] far as his role as a lawyer. And therefore, that matter if it had significance at all, had to do with a dispute as to exactly how a trustee's responsibilities ought to be carried out. And, as far as I can see, as I understand it, Mr. Locks certainly had a reasonable position and a sincere one in his handling of that.

The second one has to do with imputed disqualification to his firm by reason of the fact that the fact employed a person who had formerly been a lawyer with the Government and an objection was made that because that lawyer had worked on asbestos problems

while in the Government, that was a reason for disqualifying Mr. Locks' firm.

That conclusion might have been right under the law as it stood at the time. I point out that as I understand the facts of that case, the Rules of Professional Conduct, and I might the rules governing former Government lawyers now propounded in the code [sic] of Federal Regulations, according to those there would not have been even a nominal conflict and therefore no basis for a vicarious attribution of conflict.

So the Court may have been right. I don't want to go into that, but the point is, that the kind of conduct in question was vicarious attributed conflict to some other lawyer according to a rule I think has been now superseded, if I understand the situation.

[Tr. 77] And finally I understand that the last of the events was some criticism by a judge of Mr. Locks' raising a question in a bankruptcy case as to whether there should be separate representation for a futures class in that limited fund situation. And I didn't understand frankly why that wasn't an appropriate suggestion for Mr. Locks. Apparently maybe the Court thought Mr. Locks was suggesting that he, Mr. Locks, ought to take on that representation too, but in any event, it seems to me that isn't what he was suggesting, as I understand it.

So I do not think any of those cases, as I understand them, and I don't pretend to have gone back through all the transcripts and everything, raise any question as to his competency, his diligence or his trustworthiness or integrity.

And I have to say, these days it can often happen that a lawyer will get cross-wise with the Court, and I know many honorable lawyers who have gotten in that situation because they thought they were doing the right thing and you'd have to know exactly what the facts were before you could draw any conclusion as to how it would effect fitness for some further matter.

Q. Professor, in the report of Professors Krampton and Coniac, in Paragraph — on Page 35, 60 — I can't read it on mine, 62, can you turn to Paragraph 62 —

A. Yes, ma'am.

[Tr. 78] Q. On page 35, please?

And would you read the first sentence of that paragraph into the record?

A. "Although the broad standard of appearance of impropriety stated in Canon 9 of the AMA Model Code of Professional Responsibility is muted in the ABA Model Rules, appearances have a special importance in a proceeding of the dimension and character of this case."

Q. Do you agree or disagree with that statement?

A. I disagree with it. As to the recital, although they are muted, the appearance of propriety — of impropriety was deliberately abolished in the model rules.

New Jersey and it's version kept it and they've had trouble ever since, because it's absolutely open-ended. One person's endeavor to handle a difficult situation is in the words of an accuser, an appearance of impropriety, and it just was unmanageable and unpredictable in its application.

So it wasn't muted, it was abolished.

Secondly, I think the question of integrity and fairness is important in a proceeding involving a class suit. I don't think the right way to think about it is in terms of appearances. I think the right way to think about it is in terms of reality.

So I don't know that appearances is a useful way to [Tr. 79] think about anything of this importance.

Q. Do you know Professor Coniac?

A. Oh, yes.

Q. And what is your relationship with her?

A. Well, Susan was a student of mine in law school. She's been a friend and colleague and we did that book together. We talked about each other's papers. I mean, she's commented on papers I've written and vice versa. We are doing a program, a set of materials on continuing legal education — I'm sorry, on professional ethics in law school. We've been trying them out with lawyers, so they work both ways, and she's a fine person, and very intelligent, and I sometimes disagree with her.

Q. What about Professor Krampton, do you know him?

A. I've known Roger since 1962 or thereabouts. A long time, 30 years. He's a very fine person and very conscientious and I have a high regard for him. He's now a co-author of a case book. And I often disagree with him.

Q. What about Professor Coffey?

A. I've known Jack about ten years, something like that. I don't know that I knew him before the AIL Corporate Government's project. I observed and appreciated his work there. He's very well recognized in the corporate law field. He's written a lot. I've referred to it earlier in my testimony.

[Tr. 80] I do not think he knows very much about asbestos cases.

Q. Do you agree or disagree with the views of Professors Coniac, Krampton and Coffey with respect to conflict of interest and collusion in this case?

A. Yes, I do not think there's a conflict of interest, and I don't think there's any indication of collusion.

Q. So you're — I think I asked the question agree or disagree. So is your answer —

A. I disagree insofar as they suggest, as I think they do suggest, that there was a conflict of interest and they suggested that there was an appearance of collusion. I don't think there was any appearance of collusion and I don't think, as far as I've seen there was any collusion.

Q. In your view, is this disagreement that you have with these Professors based on the facts, the context, the law or what?

A. Well, I think it's some elements of both. That is, for example, on — I think certainly on the facts. What you understand to be the background, and so on, they recite a lot of things here that I think are incomplete, let's say. And I think on some aspects of the law, the part that we've just talked about on the continued significance of "appearance of impropriety". I think that the way it's stated here is just wrong.

* * * *

TESTIMONY OF ROBERT GEORGINE

* * * *

[Tr. 4] the fact that folks in the room back here want to hear.

And so please try to keep your voice up and close to the microphone.

Your name is Robert Georgine, G-E-O-R-G-I-N-E?

A. That's right.

Q. And where do you live, sir?

A. I live in Silver Spring, Maryland.

Q. Are you the same Robert Georgine who's listed now as lead class representative in this case, that brings us here in Philadelphia?

A. Yes, I am.

Q. Where are you employed?

A. Employed by the Building Construction Trades, Department of the AFL-CIO.

THE COURT: Can I have your voice up a little bit, sir?

THE WITNESS: In Washington, D.C.

THE COURT: You have to keep your voice up a little bit. You have to be more than conversational, unfortunately.

THE WITNESS: I'll try.

THE COURT: Do your best.

THE WITNESS: Okay.

MR. MOTLEY: If I could push this back, with your Honor's permission, I found sometimes the further I get from a witness, the more they feel like they have to speak to me

* * * *

[Tr. 18] A. — to hang our lower ceilings.

Q. How would you push through it?

A. You'd push through with a piece of pencil rod, and if you couldn't get it through that way, with a hammer or something like that.

Q. In the course of these activities that you have described, was there any dust created from the use of these fireproofing products?

A. Yes, there was a great deal of dust. In the application there was a great deal of dust, and we were always in the area. And then when you'd go back trying to put in hangers and put the other finish work that had to be done after, you'd have the same problem.

Q. Were you personally exposed to that dust?

A. Yes.

Q. Did you breathe that dust?

A. Yes.

Q. Do you recall — and I don't want you to go through a long list of names, but do you recall the names of any of the manufacturers or the brand names?

A. Well, they were all the Gypsum companies that supplied materials to U.S. Gypsum, Gold Bond, those kinds of companies.

Q. Were you exposed to those products, sir?

A. Yes.

* * * *

[Tr. 51] MR. MOTLEY: Yes, I was going to ask him if he made the objection if there's a jury sitting over there.

BY MR. MOTLEY:

Q. Are you — do you have any concerns about your own asbestos exposure, sir?

A. Well, yes, you always have concerns.

Q. Why did you — when you settled — you said you settled your claim, did you receive any cash?

A. No, I did not.

Q. Why did you settle your case if you did not receive any cash?

A. Because —

Q. What did you get in exchange for settlement of your claim?

A. Well, I got the whole system. I got this whole system that has been developed here. I got peace of mind. I got the knowledge

that if anything does go wrong, I have a right to file a claim and that it will be honored.

Q. In your evaluation of the rights that you have if you get sick later, what factors did you consider? What do you understand your rights to be if you get breathing impairment or cancer, sir?

A. If there's any impairment on me physically, related to asbestos, that I have the right to file a claim. And that claim will be processed as all other claims are processed.

[Tr. 52] Q. Mr. Georgine, have you in the past presented your views about who should be compensated from —

A. Yes.

Q. — asbestos disease to any federal agencies?

A. Yes, I have.

Q. In writing?

A. I'm sure in writing. I'm not absolutely sure, but I think so, yes, in writing and orally.

Q. And what are your views in that regard, sir, that you have expressed in the past before you became —

A. Well my views are that those that are hurt the most ought to be taken care of first. They ought to have a higher priority.

Those that are in danger of dying ought to be taken care of first. Those that are very sick ought to be taken care of first. I think there ought to be some priority established.

And those that are in danger at all and have no impairment, in my view, would get taken care of as they get to them, or should be. I mean, that's the way I think it should — that's the order that I think should take place.

* * * *

CROSS EXAMINATION

[Tr. 94] A. Yes, pretty much.

Q. Mr. Georgine, what — do you believe that people that have asbestosis and are found to have breathing problems by a doctor as a result of the asbestosis, do you believe that the Georgine settlement automatically compensates them?

A. Yes, I do.

Q. If you were to learn that there are people who have pulmonary asbestosis and who have breathing problems as a result of the pulmonary asbestosis, but do not qualify for automatic compensation under this plan, would that lead you to believe that the plan was not fair?

MR. MOTLEY: Again, your Honor, I assume that's a hypothetical.

MR. ROSENBERG: That's correct.

THE WITNESS: I don't believe that's the case.

BY MR. ROSENBERG:

Q. If it turned out to be the case, would you believe that the plan was not fair?

A. Well, you know, if it turned out to be the case, yes, I would think that that's inconsistent with what I believe the plan to be.

Q. Now, who is it that discussed with you the — which asbestos-caused lung cancers get paid, and which asbestosis cases get paid? Who gave you the background to understand how that works in the Georgine system?

[Tr. 95] A. Well, I think it pretty much spells it out in the plan in a general way. But let me go one step further. There is a provision in the plan that provides for a panel of doctors that any individual making a claim through the process, if they're not satisfied with the result of that claim, that they can make application to this panel of doctors for these five doctors to decide whether or not they qualify.

Q. And then they get it or they may not, isn't that right?

A. Well, I think that's — yeah, you do that in life care, don't you? I mean you present your case and you either qualify or you don't qualify —

Q. Well, not —

A. — I don't see anything different there than oyu [sic] do in anything else?

Q. Well, there is a substantial difference, I don't intend to argue with you, but there is a substantial difference which we will point

out to the Court later on. You're not the witness who we're going to do that with.

A. Okay.

MR. MOTLEY: Excuse me, your Honor. I respect greatly my fiend [sic], colleague's ability and talents, and I'm sure he'll make that same statement in closing argument, but I'd move that what he just commented to the witness be stricken from the record.

* * * *

[Tr. 115] "Answer: I think it's around 90. I don't know exactly.

"Question: To your knowledge, were those unions contacted before the AFL-CIO took the position that this was a fair settlement?"

And the answer was, "Each one of them, I don't know. I don't have any knowledge about that."

As you sit here today, Mr. Georgine, do you have any knowledge about whether each of the 90 affiliated unions in the AFL-CIO were contacted about whether they thought this was a fair settlement?

A. No.

Q. Mr. Georgine, you've indicated that you've had asbestos exposure; isn't that right?

A. That's right.

Q. And you've indicated that you've actually been checked to determine whether you have asbestos disease; isn't that correct?

A. That's right.

Q. And as we sit here today, it is true that you have no asbestos disease as far as you know; isn't that correct?

A. As far as I know, I do not.

Q. And as we sit here today, you are not seeking money from any of these companies that you have sued in this case; isn't that right?

[Tr. 116] A. That's true.

Q. And at the time the lawsuit was filed — at the time you became class representative, you were not seeking money from them; is that correct?

A. That's true.

Q. Now, were you aware that there were certain unions — that there were unions that were targeted for notice in this case by the people who were charged with the job of implementing the notice; were you aware of that?

A. I don't know what that means. What do you mean?

Q. Well, were you aware that one of the plans for letting people know about this settlement, one of the plans was to contact directly the members of the affiliated unions of the AFL-CIO; were you aware of that?

A. That's right, yes, I do know about that.

Q. You knew an effort had been made in that regard to contact those members and give them notice; isn't that right?

A. That's right, yes.

Q. Now, you would think, wouldn't you, Mr. Georgine, if the unions, the individual unions endorsed this deal and thought it was fair that they would want their members to have full and complete information about the terms of the settlement; namely they'd want them to have the notice packet that was approved by the Court; wouldn't you think that?

* * * *

[Tr. 120] MR. ROSENBERG: I'm going to back up, your Honor.

MR. ALDOCK: Your Honor, could I make one further objection? I think it's objectionable to show him Exhibit 3 without Exhibit 2 because Exhibit 2 has to do with what the unions did with respect to the notice and this is misleading.

THE COURT: Yes. I think Mr. Rosenberg is going to take a different approach, I don't know.

MR. ROSENBERG: Yeah. I don't intend to mislead Mr. Georgine at all.

BY MR. ROSENBERG:

Q. Let me back up a little bit and just ask you a couple of questions about notice itself.

I take it you saw the advertisements on television about the settlement when it was called the Carlough settlement; is that right?

A. Yeah, I saw one.

Q. You're aware of it?

A. Mm-hmm.

Q. Did you dial the 800 number that was there to get the packet of materials, or did somebody provide it for you?

A. No, I didn't dial the 800 number. And I saw the materials, yes.

Q. Did you ever see the packet of materials that —

[Tr. 121] THE COURT: Mr. Georgine, could you take your hand away from your mouth?

THE WITNESS: I'm sorry, I'm sorry, your Honor.

THE COURT: We need to get everything you have to say right in that microphone.

BY MR. ROSENBERG:

Q. Did you ever see a packet of materials that were being provided to give notice to people about this settlement?

A. Yes, I did.

Q. And do you understand that packet of materials that you saw are the same packet of materials that the people who were implementing notice were trying to get to various union members; do you understand that to be the case?

A. That's my understanding.

Q. Now, do you know how many unions cooperated in the notice effort so that their members could get individual packets? Do you know how many?

MR. MOTLEY: I object to the assertion, your Honor, which is misleading that the only cooperation was the mailing of the entire packages, that there were other aspects of it that —

MR. ROSENBERG: Well, I know that, except that we've already had predicate questions establishing that if the unions felt that it was fair, that it was good, that they would want to make sure their membership got the full notice packets in order to make a judgment.

[Tr. 122] THE COURT: That's not what this witness said.

MR. ROSENBERG: I thought that —

THE COURT: He said I don't know about notice packages, but they ought to have accurate information. That's what he said. But you may ask other questions in this area.

MR. ROSENBERG: Thank you.

BY MR. ROSENBERG:

Q. Mr. Georgine, did you actually open the envelope and look at the notice materials yourself?

A. Yes, I did.

Q. In your opinion, did they provide a complete and accurate description of what union members ought to know about the settlement before making a judgment on it?

MR. ALDOCK: I object, your Honor. That's a legal — the Court has passed on that already —

MR. ROSENBERG: I asked about his opinion whether this is good notice for his members.

MR. ALDOCK: (Inaudible)

THE COURT: I don't view the question as requesting a legal opinion. The question follows up on the question that I just recalled for the record, that he thought the union members ought to get accurate information, so the objection is overruled.

[Tr. 123] THE WITNESS: What I saw, I thought the information was accurate. I thought that it was complete. I — as a union member. I looked through it. I thought that it was pretty extensive.

BY MR. ROSENBERG:

Q. And did you think that it had sufficient information in it so that a person who read it could make an informed judgment about whether he wanted to be in the settlement? Would you think that's the case?

A. Yeah, I think that there was enough there for a person to make an informed judgment.

Q. Now, were you aware that unions throughout the AFL-CIO were requested to either mail those notice packets to their

membership or provide mailing lists so that they could be mailed to the membership; are you aware of that?

A. Am I aware that what? Specifically what are you asking me?

Q. That your members, the member unions of AFL-CIO were requested to cooperate in the effort to distribute those notice packets to their members.

A. Yes, I'm aware of that.

Q. And are you aware of the fact that they were asked for mailing lists so that they could be mailed to those people? Are you aware of that?

A. Well, I assumed that took place. I didn't follow it to every — you know, all the way through the process.

* * * *

REDIRECT EXAMINATION

* * * *

[Tr. 165] Q. You under —

THE COURT: I thought you finished the question?

MR. MOTLEY: Well, I — I don't think I — because I was about to ask him in exchange for something and what was that something he understood he received in exchange for the —

THE COURT: I thought you just wanted a yes or no answer and then ask him another question. You have to ask it all over. again.

I'll let him answer this question yes or no. Yes, and did you know if you had a claim you were giving it up for zero. If this — you had a claim?

THE WITNESS: Yes. The answer is yes.

MR. MOTLEY: Okay. Thank you, your Honor.

THE COURT: And that's a question by the Court is subject to the objection Mr. Rosenberg made. Go ahead.

BY MR. MOTLEY:

Q. Did you consider whatever benefits might be allowed to you in the Georgine system in making that decision? Did you personally?

A. Yes.

Q. And what considerations are those?

A. Well, the considerations are that I — I've not precluded myself from coming back, if I develop a cancer or a cancer- [Tr. 166] related — asbestos-related cancer, that I have the opportunity to come back. I have — that gives me a certain amount of peace of mind that I'm covered in the eventuality that I do contact a disease that is asbestos-related.

Q. Sir, I ask — this if [sic] the final question I'm going to ask you.

You were asked a series of questions about — and I want to make sure the record's not confused here.

There was a meeting in Palm Springs. now, [sic] tell us again so the record is clear, what organization was it that met in Palm Springs, California?

A. Building and Construction Trades Department of the AFL-CIO, had it's quarter — first quarterly meeting of the governing board of general presidents.

Q. And you had referred earlier to meetings that took place — that meeting in Palm Springs was in January of this year?

A. That's right, January 17th.

Q. But you referred to earlier meetings and communications throughout the year of 1993, correct?

A. I did.

* * * *

[Tr. 170] Q. Mr. Georgine, you realize that there are lung cancers that are alleged to be asbestos caused that may be nonqualifying under this plan, do you realize that?

MR. ALDOCK: Objection. Beyond the scope and repetitious for other things —

THE COURT: Sustained for both reasons.

BY MR. ROSENBERG:

Q. All right. Now, you were asked by Mr. Motley what you got in return for what you gave up, isn't that right?

A. That's right.

Q. Well let's go over exactly what you gave up. You gave up as you see it, your right to seek money damages from CCR today, is that right?

A. That's right.

Q. But Mr. Georgine, you've been represented by Mr. Motley in this case. Has he indicated to you that you have a current right to seek money damages from CCR —

A. Well —

Q. — because of what asbestos has done to you?

A. — I don't believe I have a current right to seek damages —

Q. That's correct.

A. — from CCR.

Q. And neither has —

A. Only because — only because I'm not impaired, and I have [Tr. 171] no damage that I know of that's caused by asbestos. Therefore, I don't feel that I would have any claim to any —

Q. And no lawyer in this case has ever advised you that you do, did they? That you have a current claim for money damages as a result of being exposed to asbestos?

A. No.

Q. Right. So what you gave up is your right not to file a claim that you couldn't file anyway, correct?

MR. MOTLEY: I object to that, your Honor. It's his personal philosophy.

THE COURT: Sustained.

MR. MOTLEY: He's not studied the law of whether he can file a claim or not.

BY MR. ROSENBERG:

Q. You hail from the State of Maryland, is that correct?

A. That's right.

Q. And you indicated that — as Mr. Motley asked you the thing of value that you thought you were getting, is that if you ever had

cancer — well, first of all, have you ever had a nonqualifying disease and then got cancer, that you would have the opportunity to come back with CCR's, is that right? Was that one of the things that you think is a benefit, a matter of value that you're getting in this case?

* * * *

TESTIMONY OF MICHAEL ROONEY

* * * *

[Tr. 175] began, please?

A. Beginning in 1980, I assumed responsibility for the handling of asbestos related claims. And in 1981, the responsibility for supervising asbestos related claims.

Q. What responsibilities did you assume when you became the vice president for claims at the CCR?

A. I assume responsibility for the supervision of settlement of asbestos related claims on a nationwide basis.

Q. Did those responsibilities change when you became the chief operating officer?

A. Yes. In addition to responsibility for the claims department, I assume responsibility for the other CCR operating departments.

Q. Did you succeed anyone as COO, or is that a newly created position?

A. No, that was a newly created position.

Q. Who do you report to at the center?

A. I report to Mr. Fitzpatrick, the chief executive officer and to the CCR board of directors.

Q. Are you a lawyer, Mr. Rooney?

A. No, I'm not. Just someone surrounded by lawyers.

Q. I'm going to ask you now a series of questions about the negotiations that resulted in the proposed class action settlement.

Did you actively participate in those negotiations?

[Tr. 176] A. Yes, I did.

Q. Who were the principal negotiations for the CCR defendants?

A. Yourself, your partner, Mr. Aldock, and also your partners, Mrs. Geise (ph) and Mr. Geers (ph), although they're involved with substantially the medical criteria.

Q. And who were the principal negotiators for the class of claimants?

A. Mr. Motley, Mr. Locks, Mr. Rice and they were joined at various times by additional colleagues.

Q. Did you know Locks, Motley or Rice before these negotiations began?

A. Not really. I had met Mr. Locks in 1980, during my early days of involvement handling asbestos claims. And I met Mr. Rice and Mr. Motley on one or two occasions, after I joined the CCR. But I certainly knew all three by reputation.

Q. And what was that reputation?

A. Well I think it would be fair to state that all three are leaders of the asbestos plaintiffs' bar, who have been involved in the litigation for a long time.

Mr. Motley and Mr. Locks have also been involved as co-counsel for the plaintiffs' committee on MDL. Both law firms have been involved for a number of years litigating cases and settling cases with the CCR.

Q. When did your participation in the negotiations that [Tr. 177] resulted in this settlement begin?

A. Some time in February or March of 1992.

Q. How would you describe the status of negotiations at the time that involvement began?

A. Well, I think that based on the previous few years of global settlement negotiations, there were some basic conceptual agreements that were reached, such as the concept of deferral of unimpaired cases, although I think it's fair to say that there was no agreement on a line for the impairment criteria, if you will.

I think it was agreed that the negotiations were viewed in a way that the CCR companies were not a limited fund. I thin [sic] the parties were looking for the development of an administrative system that minimized transaction costs.

And I think probably the other significant issue would be the concept that the CCR historic average — averages would be used as a bases for the negotiation.

Q. Did Locks, Motley and Rice participate actively in the entire negotiations during the entire time, from February through January 1993?

A. Mr. Locks participated in negotiations during that entire time period. Mr. Motley and Mr. Rice left the negotiations for several months.

Q. Why was that?

[Tr. 178] A. They were busy trying the consolidated case in Baltimore from probably — I don't know, May through July.

Q. Did they re-enter the negotiations at the end of the Maryland trial?

A. Yes, they did.

Q. Did you meet often with Motley, Locks and Rice?

A. We met very often. Typically at least weekly. There were several occasions where it was more than once a week. And there were numerous conference calls.

Q. Where did you meet generally?

A. Usually we met in Philadelphia or Washington, perhaps Charleston. Occasionally other locations.

Q. Did the CCR decide at some point in these negotiations to share confidential claims data with Locks, Motley and Rice?

A. Yes, we did.

Q. Had the CCR defendants ever before shared such data with any plaintiffs' counsel?

A. No.

Q. I'm going to refer you and the Court, if I may, to Settling Parties Exhibit 500 and Settling Parties Exhibit 501. Both of these exhibits are letters under Shea and Gardner letterhead from John Aldock, the first addressed to Mr. Gene Locks, and the second to Mr. Ron Motley.

Can you identify each of these documents for the Court?

A. Yes, I can. These are basically letters that state, "In

* * * *

[Tr. 200] Q. I'll ask you turn back now to SP-300, the stipulation itself, and I'd like to refer you to the table to the contents beginning at little "i."

(Pause in proceedings.)

Q. How long is that table of contents, Mr. Rooney?

A. Almost five pages.

Q. Would you look that over and identify for the Court any sections or subsections of this agreement that would not be subject of extensive negotiation?

A. I don't recall any sections that didn't include substantial negotiation, but I can look through the list in its entirety if you'd like.

Q. Review it briefly, and if you can, I'd just like some sense from you as to the extent of the negotiations and the characterization of the negotiations with respect to the provisions that are reviewed there in the table of contents?

A. These were long difficult frustrating and very complex negotiations resulting in this 100-page stipulation of settlement. I don't recall any specific provision in here that would be described otherwise.

Q. Before turning to the terms of the class action settlement itself, I'd like to ask you a few questions about the so-called inventory settlement of present claims that the CCR defendants negotiated with Greitzer and Locks, with Ness, Motley and with the different affiliated law firms with Ness, [Tr. 201] Motley in Georgia, Illinois and West Virginia.

Would you describe to the Court what you mean by the term inventory settlement?

A. An inventory settlement is one in which we settled all or substantially all of the pending cases with a given law firm, and quite typically would include the settlement of cases that are in the particular plaintiff's attorney's office in the pipeline, if you will, that are basically cases ready to be filed, cases where there has been a medical work up and some indication of the defendants that will be brought into that case.

THE COURT: Would or would not include?

THE WITNESS: Would include some of those cases, your Honor.

BY MR. HANLON:

Q. At some point after the negotiations that resulted and the proposed settlement began, did Locks, Motley or Rice ever ask you about the CCR's intentions with respect to the claims already pending against the CCR's defendants?

A. At many different points in time they did.

Q. What did they ask you?

A. They were concerned that the negotiation of a settlement that dealt with future cases not be used in any way to — by the CCR to avoid or delay the settlement of pending cases.

Q. And how did you respond to that concern?

[Tr. 202] A. Well, we had for some time in the global-negotiations that had been previously described, we had been looking for some rational way of dealing with the entire asbestos problem, both pending cases and futures.

And we indicated to them that once we believed that there was some rational way of dealing with the futures, that we were prepared to address the settlement of pending cases.

Q. Did the CCR later decide at some point after these negotiations began to attempt to negotiate inventory settlements without seeking a commitment from the settling counsel to support the adoption of a pleural registry?

A. Yes, we did.

Q. When did the CCR make that decision?

A. Once it was probable to us that the negotiations would be successfully concluded for class action settlement, we began to negotiate inventory settlements without a pleural registry.

Q. When did the CCR come to believe that the class action settlement negotiations were probable or likely to result in a class action settlement?

A. Some time in May or June of 1992.

Q. And what was that belief based on?

A. That was based on the progress at that point in time in the negotiations with Mr. Locks. We basically had developed a substantially detailed draft of a class action settlement, [Tr. 203]

and it was our belief that the negotiations were likely to result in an agreement.

Q. Now, at what point in time did the CCR begin active negotiations on an inventory settlement of Greitzer and Locks' present cases?

A. Approximately June of 1992.

Q. And did the CCR defendants later attempt to negotiate settlement on an inventory basis of certain claims represented by the firm of Ness, Motley?

A. Yes, we did.

Q. And when did those negotiations begin?

A. Some time in late September or early October of 1992.

Q. Was the CCR also attempting to negotiate inventory settlements with other counsel around this time?

A. Yes, we were negotiating with a number of other firms.

Q. And did these negotiations with class counsel with law firms affiliated with class counsel or with other counsel, result in any inventory settlements either shortly before or after the filing of the proposed class action settlement on January 15th, 1993?

A. Yes, they did.

Q. Could you briefly summarize those inventory settlements for the Court, please?

A. The — we reached a settlement with Mr. Locks for approximately 4,000 claims primarily in four states, [Tr. 204] Pennsylvania, New Jersey, New York and Kentucky. We reached an agreement with Ness, Motley with respect to their firm's cases in South Carolina for approximately 450 cases. We reached agreements to settle approximately 10,000 cases with Ness, Motley affiliates primarily in the States of West Virginia, Illinois and Georgia.

And in addition to that, we negotiated settlements of approximately I think somewhere between nine and 10,000 additional cases with eight or ten other law firms.

Q. Would you describe to the Court what you mean by the term Ness, Motley affiliates?

A. Ness, Motley has arrangements, if you will, with various firms throughout the country where they, as I understand it, at least have some agreement with respect to Ness, Motley trying cases in various jurisdictions throughout the country.

Q. Do you have some sense of how many affiliated Ness, Motley firms there are?

A. I really don't know what the total number are. It seems to — it changes daily but it's substantial. It's well over 50 law firms.

Q. How did the CCR negotiate the settlement amounts agreed to in each of these inventory settlement agreements?

A. Primarily we used the historic settlement averages as the basis for negotiations with appropriate adjustments based on factual differences between the historic cases and the [Tr. 205] inventory cases that were being negotiated.

Q. What sort of differences are you referring to?

A. Typically we would find that there were differences with respect to occupation or job site. In some situations differences in the percentages or make-up of the medical.

Q. In the case of the firms that were affiliated with Ness, Motley, were the relevant historical averages, the CCR's averages with Ness, Motley or with each of the settling counsel?

A. With each of the settling counsel.

Q. The affiliated counsel themselves?

A. Yes.

Q. Were the settlement amounts payable by the CCR defendants under these inventory agreements generally payable up front?

A. No, they were not.

Q. How were they payable?

A. They're payable over a number of years.

Q. Let me ask you to turn now, Mr. Rooney, to the three exhibits marked SP-302A, 302B and 302C.

(Pause in proceedings.)

Q. I'd like you to turn first to 302A which contains three settlement agreements between the CCR and Ness, Motley

regarding claimants in the State of South Carolina. The first of these agreements is dated January 14th, 1993 and the next two agreements which purport to supersede that January [Tr. 206] agreement are dated June 11th, 1993.

Can you identify these documents?

A. Yes. These are the settlement documents which confirm the settlement of Ness, Motley cases in South Carolina.

Q. Did you negotiate each of these documents with Ness, Motley in the — with Ness, Motley?

A. Yes, we did.

THE COURT: Excuse me. Is that only in A or is that all three of those?

MR. HANLON: I was going to turn to B right now, your Honor.

THE COURT: The testimony was about 302A?

MR. HANLON: With respect to 302A. And the three agreements regarding the South Carolina claimants.

BY MR. HANLON:

Q. Let's turn now to 302B, Mr. Rooney. 302B contains a number of similar settlement agreements. They purport to be between the CCR and a number of different counsel in the States of Georgia, Illinois and West Virginia. Again, they're dated different times. Some dated in January of '93 and in some cases additional superseding agreements dated in June of 1993.

Can you identify ea[illegible]of these agreements for the Court?

A. These — yes. These are the settlement agreements and [Tr. 207] the superseding agreements with each of the Ness, Motley affiliates in those jurisdictions.

Q. Did you execute each of these agreements for the CCR defendants?

A. Yes.

Q. I'd like you to turn now to the group of documents contained at 302C. These documents appear to be letters from the law firm of Greitzer and Locks to the CCR regarding various inventory settlements in different jurisdictions.

Can you identify each of these letters for the Court, please?

A. Yes. Each of these letters either from Mr. Locks or one of his partners are directed to Mr. Geers in the CCR confirming the settlement of cases in the states where they had cases, including Kentucky, Pennsylvania, New Jersey and New York.

Q. Did any of the inventory settlements referred to in the settlement agreements in 302A or 302B or referred to by the documents from Greitzer and Locks to the CCR defendants in 302C? Did any of those inventory agreements include any unfiled claims against the CCR defendants, claims that were unfiled at the time the agreements were negotiated?

A. Yes. I'm sure that there were some unfiled claims in those settlements.

Q. Was there anything unusual about the inclusion of unfiled [Tr. 208] cases in those inventory group settlements?

A. No. As I've described, it was — it's not unusual at all for an inventory settlement to include cases that a lawyer has that are not yet filed but cases that are ready to be filed, if you will.

Q. Do you know how many unfiled claims were included in these various inventory settlements?

A. I don't know the exact number, but it's a relatively small percentage of the cases.

Q. After you reached an agreement as to the terms of one of these inventory settlements and the numbers of the inventory claims to be settled, did you later agree to add any additional unfiled claims with respect to any of these agreements?

A. No, I don't believe so.

Q. Now, when the CCR began negotiating these inventory settlements with Locks, with the Ness, Motley firm and with the different Ness, Motley affiliate firms in the period from June through November, 1992, had any agreement yet been reached on the precise medical criteria that's contained in the proposed stipulation of settlement?

A. No, it had not.

Q. What was the status of the negotiation on the medical criteria contained in the stipulation for non-malignant claimants during that period from June through November, [Tr. 209] 1992?

A. There was an agreement reached on the concept of deferral of non-impaired claims or deferral of some claims that would not meet a criteria but the actual criteria had not yet been agreed to.

Q. When you reached agreement first with Greitzer and Locks and then with Ness, Motley, and the dozen or so Ness, Motley affiliate firms in Illinois, Georgia and West Virginia, on each of the inventory settlements agreed to by these firms in the different jurisdictions, were any other commitments obtained from these firms by the CCR with respect to potential future claimants represented by these firms?

A. Yes.

Q. And what were those commitments?

A. We obtained a commitment from the Ness, Motley firm that they would not file cases against CCR members in the future unless they met certain specific disease criteria and agreement from the Greitzer and Locks firm that they would not handle cases unless they met certain mutually agreeable disease criteria.

Q. Did you obtain similar commitments from the Ness, Motley affiliate firms?

A. Yes.

Q. Did you make any commitments to these firms in turn for the commitment regarding future claims?

[Tr. 210] A. Just an agreement to toll the statute of limitations.

Q. I'd like to refer you now to one of the Greitzer and Locks letters in SP-302C. It's one dated October 26th, and it's marked CCR 545 in the lower right-hand corner. It's a copy of a letter from Lee Balefsky, one of Mr. Locks' partners to Kevin Geers.

Can you identify this letter for the Court?

A. It's a letter from Mr. Balefsky dated October 26 to Mr. Geers at the CCR confirming the settlement of 2,602 cases in the State of Pennsylvania.

Q. Did you receive a copy of this letter at or about the time it was sent to Mr. Geers?

A. I'm sure I did, yes.

Q. Now, Mr. Locks had met a prospective client, say, in early October and his claim had not yet been worked up by mid-October, is that a claim that would have been included in the inventory settlement of the Pennsylvania cases?

A. No, I would think not. The negotiation of the settlements in each of these jurisdictions took place, oh, for a period of a few months and the cases that would have been included would have been cut off at a certain point in time, otherwise we'd have a moving target in terms of the cases to be included in any settlement.

Q. Let me turn your attention to the last paragraph of this letter, please.

[Tr. 211] Mr. Balefsky states there, and I quote, "It is further understood that in the future Greitzer and Locks will not handle or process claims against the CCR defendants unless they meet certain mutually agreeable disease criteria."

What was your understanding as to the purpose of that sentence?

A. The purpose was to confirm the commitment with respect to future cases citing the fact that we would use specific disease criteria once it was agreed to.

Q. And again what was that commitment?

A. The commitment to not handle cases in the future unless it met certain criteria.

Q. Did you understand when he specifically meant by his reference to mutually agreeable disease criteria?

A. Yes. We intended to use the criteria that was ultimately negotiated in the class action settlement.

Q. Was that criteria agreed to at the time of this October 26th agreement?

A. No, it was not.

Q. When was that medical criteria contained in the proposed class action settlement actually agreed to?

A. The medical criteria was negotiated continuously, oh, up until probably just a few days prior to the filing of the complaint and the stipulation of settlement in January of

* * * *

[Tr. 219] slow cadence?

THE COURT: I'm not thrilled. Sit down, Mr. Motley.

MR. HANLON: The question I have for Mr. Rooney, your Honor, was whether he had negotiated and executed this agreement on behalf of the CCR defendants?

THE COURT: And he said not all of it, as I recall.

MR. HANLON: He said he had not negotiated all of it, the question was then, had he executed this agreement on behalf of the CCR defendants?

THE COURT: Unless someone forged his name, it's at the end, yes.

BY MR. HANLON:

Q. Would you confirm that's your signature, Mr. Rooney?

A. That is my signature.

Q. Would you turn to the next two agreements in SP-302A, Mr. Rooney.

Are these the two agreements dated June 11th, that purport to supersede the January 14th agreement that you identified earlier for the Court?

A. Yes.

Q. Why did the parties decide in June 1993 to amend the January 14th agreement?

A. Shortly after the January agreement, there was a — an ABA opinion letter, which was published and it was the intent of the parties to further clarify our earlier agreement.

[Tr. 220] Q. Can you describe how these superseding agreements changed the January 14th agreement?

A. Basically they changed the agreement by segregating the understanding with respect to future claims into a separate — a separate agreement. So that Section 5 of the earlier agreement is addressed in a separate agreement, in the June version.

Q. Did the superseding agreement carry forth the will not file language that you referred to in Paragraph 5 of the earlier agreement?

A. No, it did not. It changed the will not file to will recommend an ADR mechanism with respect to those cases that don't meet specific disease criteria.

Q. In your view, did that change — change the nature of the commitment made by Ness, Motley with respect to future claimants represented by that firm?

A. No, it did not. The — we always viewed both versions as a commitment, a good faith commitment by those law firms with respect to future cases. I had no objection with respect to changing the language after the ABA opinion letter, because in my experience in litigation over some 14 years, rarely does a client reject advice of counsel, so I didn't view the will recommend as being significantly different than the will not file.

Q. Mr. Rooney, in your deposition Mr. Baron asked you at

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[Tr. 246] couldn't have been offered, your Honor. He asked an impossibility.

THE COURT: I don't think that's grounds for an objection. Overruled. If that's the question, it may be a non sequitur, but that's — if you want to ask —

BY MR. BARON:

Q. Was it ever reported back to you that Mr. — well, by this time that you were negotiating with Mr. Locks, and that was into December of 1992 on his present inventories, was it not?

A. I don't recall the specific time frame of the negotiations, but

...

Q. I believe the last agreement that you entered into was the New York agreement which you entered into in December, if that refreshes —

A. Sounds about right.

Q. All right. By December you knew that there was going to be — that there was a strong likelihood that there was going to be a Carlough agreement, did you not?

A. I would say it was more probable than in June.

Q. Okay. Did Mr. Locks in December of 1992 demand that his present pleural cases be handled under the terms of this deal that was going to be filed the next month.

A. In December of 1992, Mr. Locks' present cases were settled.

[Tr. 247] Q. Okay. And non [sic] of them were deferred, were they?

A. No, his present cases were not deferred.

Q. Okay. Now, let's talk about Ness, Motley for a while. You settled about 10,000 cases with Ness, Motley between September and January 14th of 1993.

A. That's correct.

Q. Do you know whether any of those 10,000 cases involved claims for people who had pleural injuries?

A. I'm sure there were such claims in those inventories.

Q. Do you know whether any of the Ness, Motley lawyers demanded deferral for those pleural cases within that 10,000 number group of cases?

A. I'm not aware of any such demand made by Ness, Motley.

Q. And once again were you the person that was supervising the negotiations with Ness, Motley pertaining to the inventory deals?

A. Yes, I was.

Q. Was it ever reported back to you that Ness, Motley was demanding that their own present pleural cases be dealt with under what was going to be the Georgine or Carlough agreement?

MR. MOTLEY: Your Honor, objection. I have an additional ground to Mr. Locks. I know you already passed on Mr. Locks' objection, but I have a slightly different ground in addition to what he said.

* * * *

[Tr. 256] those 14,000 cases?

A. Yes, sir.

Q. Are you requiring two pathologists in the mesothelioma cases?

A. No, I have already said that we weren't.

Q. Are you requiring underlying asbestosis or markers in the lung cancer cases?

A. No, sir.

Q. So the present cases got a better deal than the future cases, didn't they, because they don't have to go through all of that?

A. The present cases got a different deal. I agree with that.

Q. Well, it's an easier deal, isn't it?

A. It's certainly easier in terms if you have to have one diagnosis versus two, I guess you could state it was easier.

Q. Well, for somebody with lung cancer you don't have to have underlying asbestosis, yet you wouldn't qualify under Georgine, so it's a better deal for those people, isn't it?

A. It's easier — it would be easier to be qualified, I guess that's right.

Q. Well, it would be impossible to be qualified automatically under Georgine if you don't have markers, correct?

A. The criteria speaks for itself, but generally I have [Tr. 257] agreed that there is a requirement for some underlying finding in addition to lung cancer, yes.

Q. Mr. Rooney, an individual who had lung cancer, who had a doctor that said it was related to asbestos, but he had no markers would receive zero in terms of the automatic provisions of Georgine, yet if he had been represented by Ness, Motley, in the present inventory deals, he would have gotten historical average for lung cancers, correct?

A. I've already said that the standards with respect to the settlement of present claims are different.

Q. Is that true what I just said?

A. Yes.

THE COURT: I think it would be unfair not to note for the record that the claimant in that situation might get compensation under Georgine if it were approved by going through the claims process and have the dispute resolved. It doesn't mean they're not going to get any money. I just —

MR. BARON: Your Honor, we're going to argue —

THE COURT: — wanted to point that out.

MR. BARON: — that point at the right time, because I don't believe they can meet the requirements even of the special exceptions panel, but that's not what I'm asking him here.

THE COURT: I know, but I think you're constantly asking questions that leave out the other half of the — at

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TESTIMONY OF MICHAEL ROONEY

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[Tr. 76] BY MR. RICE:

Q. Mr. Rooney, you told us at some point you became reasonably confident and that you then proceeded to negotiate with the Greitzer and Locks firm, resolution of their inventory of cases. Whatever that time was, I want to know what you became reasonably confident of?

A. We became reasonably confident that we would be able to negotiate a class action settlement with respect to future claims.

Q. At the time you developed that reasonable confidence as it related to Mr. Locks, was Ness, Motley at the table, Mr. Motley and myself at the negotiating table at that period of time?

A. No, you were not.

Q. And do you have any personal knowledge as to where we were?

A. I have a lot of personal knowledge. You were in Baltimore trying the consolidated proceeding.

Q. When, if ever, did you develop a comfort — a reasonable comfort level with Mr. Motley and myself on the same type issues you referred to having the comfort level with Mr. Locks in the summer of '92?

[Tr. 77] A. Some time after your re-entry into the negotiations, approximately September of 1992.

Q. Now, I believe the testimony has been that the Ness, Motley, so-called inventory deal was done in November of '92, is that true?

A. The agreements I believe state that they confirm the agreement of principal with respect to certain jurisdictions around November of '92, that's correct.

Q. Mr. Rooney, did Ness, Motley and its affiliates during that period of time have involvement in more than nine or 10,000 cases that were currently filed against the CCR?

A. Certainly.

Q. And can you tell us to the best of your knowledge, the approximate number of the pending cases that CCR had during that period of time that Ness, Motley was involved in, either directly or through its affiliated counsel?

A. Sorry, that period of time being approximately September of '92?

Q. September, October '92?

A. Probably somewhere in between 20 to 25,000.

Q. I want to focus with you on Mr. Baron's comments in an opening statement, not quoting word for word, but basically argued that the — Ness, Motley was forced to enter into some type of arrangement with CCR because they're cases or inventory cases were stayed or trapped in federal court.

* * * *

[Tr. 102] Q. That concept of their being the need — their being clients that didn't accept the recommendation of the client (sic) how did that concept apply to Paragraph 5 in the futures provisions?

A. It's basically the same concept. There would forseeably be rare circumstances where your recommendation would not be accepted, and a client would insist that their case be filed, and it would be filed.

Q. And in both contexts, both the presents under the agreement and the futures, if the client didn't accept the recommendation, could the case be filed and status quo kept?

A. Yes, that's correct.

Q. Now, Mr. Rooney, you told us that at the time the inventory deal with Mr. Locks was done, and subsequently at the time the inventory deal with Ness, Motley was done, that the CCR was reasonably confident that a resolution to part of their asbestos crisis was going to be reached, than an action similar to Georgine to proceed.

Tell us what your understanding is of what would have happened to the cases that were settled under these inventory agreements if in fact a stipulation of settlement had not been reached and had not been finalized subsequent to November of '92?

[Tr. 103] A. Whether or not the stipulation of settlement was ever filed, had no bearing on whether these settlement agreements were in full effect. They were and would have remained in effect no matter what the outcome of the negotiations.

The CCR basically took the risk at some point in time based on their anticipation that or expectation that it was probable that we would be successful in our negotiations.

Q. Mr. Rooney, I want to focus your attention a little bit more to the particular cases involved in the Ness, Motley inventory settlement.

Yesterday you told Mr. Hanlon that occupation or occupational mix was one of the many factors that the CCR claims people looked at in dealing with a case and valuing a case and settling a case because it effected the exposure, do you recall those discussions?

A. Yes.

Q. Did that apply also in the so-called inventory deals?

A. Certainly.

Q. Mr. Baron has made reference in a prior hearing before this Court a few weeks ago, that "A large number or large volume of cases of the Sheetmetal Worker Union trade were involved in the Ness, Motley inventory settlements."

Do you recall those comments being made?

A. I've become aware of those comments, yes.

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DEPOSITION OF ANDREW CHURG

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[Tr. 49] And then, lastly, there is a long section on how to count exposure and how much exposure. And a lot of this is sort of historic on industrial hygiene, if you will, that I really don't feel qualified to get into, except that clearly, the intent of this, which appears to be reasonable, is that when you take the people we know historically had high exposure or some sort of reasonably high exposure, we know the periods in which these occurred, and we will make some formula which says what this exposure should tally out to.

What this does, I think, is again, to balance the interest of plaintiffs and defendants. It prevents everyone who has nothing to do with asbestos from coming forward and claiming that they have a lung cancer caused by asbestos.

On the other hand, in my opinion, it also favors the plaintiffs, because my own belief, on a scientific basis, is that the only association of asbestos exposure and lung cancer is the association of the specific disease asbestosis, that is, diffuse fibrosis and lung cancer.

[Tr. 50] And my belief from the science is, if you don't have asbestosis, your lung cancer has not been caused by asbestos exposure.

Well, this settlement is more generous than that. It doesn't require asbestosis. It requires some other diseases, which, in fact, occur at lower exposures, and which are considerably more common than asbestosis.

So it is reasonable in the sense that it is scientifically defensible. It is reasonable in the sense that I think it balances everyone's interests.

Q. Doctor, you mentioned your own belief.

Do you have an opinion concerning whether there is a debate in the medical and scientific literature concerning the requirements for attribution of a lung cancer to asbestos exposure?

A. Oh, yes, there is a debate.

Q. And have you yourself had occasion to write on that issue recently?

A. Yes, I have.

* * * *

[Tr. 56] these studies have followed groups of workers. In the study from Hughes and Weill in New Orleans, they followed workers of an asbestos cement plant, and the studies by Sluiss-Kramer, which is from South Africa, they have autopsied lungs from workers at an amosite mine.

They also had exposure data. In other words, they knew how much exposure or what the exposure level was and how long, so they could tell, in an individual case, what the actual exposure was. Fiber burden is simply another way of looking at actual exposure.

And what both these studies concluded was it was not fiber burden that was associated with lung cancer. It was asbestosis specifically.

So that's very good, hard scientific data that says that fiber burden is not informative in this regard, and fiber burden is not what you should be using.

So for those reasons, I don't think that fiber burden is a reasonable approach in determining when to compensate a lung cancer.

Q. Doctor, do you have an opinion concerning what the majority or consensus view is among [Tr. 57] researchers and investigators in the field of asbestos and disease concerning what is required to attribute a lung cancer to asbestos exposure?

A. Well, that's a very difficult question. I think the majority opinion can be viewed thusly.

If you would combine the proposition that you must have asbestosis to attribute a lung cancer or you must have a very high level of exposure to attribute a lung cancer, you would probably have now the vast majority of people in the field.

The notion that any exposure, no matter how low, increases lung cancer is held by a very small minority, and I don't think is scientifically compensable.

Q. Doctor, as an observer and consultative participant in the tort system as it relates to claims for asbestos and disease, do you have an opinion regarding whether this Amended Stipulation of Settlement, if adopted, would represent an improvement over the tort system in the manner in which individuals are determined to be eligible for compensatory payments for asbestos-related disease?

MR. ROSENBERG: Objection.

* * * *

[Tr. 60] BY MR. HOUFF:

Q. Doctor, just by way of further explanation, you indicated, I believe, that you had testified two or three times a year in trials; is that correct?

A. That's right.

Q. Over what period of time has that been true?

A. Oh, I would say, probably the last six or seven years.

Q. Has that been in the United States?

A. Yes.

Q. And approximately how many depositions have you given on an annual basis, on the average, over the last ten years?

A. On an annual basis, I don't know. I have given several hundred depositions. It would sort of be a guess. It probably could vary between 20 and 60 in a given year. 60 would probably be very high.

Q. Now, Doctor, one final question.

What is your understanding of whether persons who have pleural plaques and no evidence of pulmonary function impairment, how they [Tr. 61] would be treated under the Stipulation of Settlement?

A. Well, my understanding is that they would not be eligible, if that was all they had, for any kind of compensation. They would be eligible, if they later developed one of the other conditions that's listed in the Settlement, but if all they have is plaques and nothing else, they wouldn't be eligible.

Q. And how do you view that treatment of persons with pleural plaques without any other impairment?

A. I think that's eminently reasonable. Pleural plaques, without any other evidence of impairment, are simply a blemish. They are something that shows up on your chest x-ray.

A lot of this, obviously, is a legal issue. Are you entitled to compensation for having an ugly chest x-ray?

From a medical point of view, my answer is, why should you be entitled to compensation, when there is nothing wrong with you? Particularly, in a setting in which there are people who have something that clearly is wrong with them caused by asbestos.

[Tr. 62] Q. Doctor, do you have an opinion concerning whether your view that pleural plaques, in and of themselves, constitute, as you call it, a blemish, represents a consensus or majority view among researchers and investigators into asbestos and disease?

A. I think it does.

MR. HOUFF: Doctor, those are all the questions that I have for you at this time. I suspect we are going to want to take a little bit of a break and reorganize here. Maybe you would like to take a break. We will go off the record, and we will come back on either direct by Mr. Locks or cross by Mr. Rosenberg.

THE WITNESS: Do you know that you have no image that I can see at the minute, by the way? I think you are still on document.

MR. HOUFF: Okay. How are we now?

THE WITNESS: That's good.

MR. HOUFF: We are going off the record now.

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TESTIMONY OF PAUL EPSTEIN

* * * *

[Tr. 24] A. A disease is quite simply a process that changes the way the individual feels or it produces a change in the physiology of the individual or it shortens his life span.

Now, if a person doesn't feel any different, and it doesn't change his physiology and it doesn't shorten his lifespan, I don't call that a disease. I think there has to be something wrong with the individual, in the way he feels or functions.

THE COURT: You're saying the mere presence of an abnormality and nothing more is not a disease.

THE WITNESS: Right. Exactly. And that is very much the type of thing that I was indicating with regard to the sun exposed individual, who has thickening of the skin on the back of his neck. I don't think that's a disease, I think that's an observable change that's due to his occupation. But I don't call that a disease. I don't think anyone else would, either.

BY MR. BEERS:

Q. Asbestosis you do call a disease.

A. Oh, certainly I call asbestosis a disease. That is something that will make the individual feel bad. I can measure the changes, and that might shorten the individual life's span.

Q. But pleural plaques and pleural thickening you do not [Tr. 25] regard as a disease.

A. I don't. And the reason I don't is that pleural plaques or pleural thickening will in the vast majority of the cases cause no symptoms. It will cause no change in physiology, and it will not have any affect on the individual's life span.

THE COURT: Isn't there some change in physiology by the mere presence of the plaques or thickening themselves?

THE WITNESS: Well some —

THE COURT: I mean, the cells are different.

THE WITNESS: — some people think that that happens. I've looked at the literature on that fairly carefully, and in my opinion,

the vast majority of people who have those plaques or pleural thickening will not have a change in their lung physiology.

There are very rare cases where it does occur, but by and large, I don't think that is a common problem.

BY MR. BEERS:

Q. Do pleural changes grow into a disease? Do they transform —

A. No.

Q. — transform into a disease?

A. No. Look there may be individuals who have progressive thickening of the pleura. Under very rare circumstances, that can cause disease, and we would be able to measure that [Tr. 26] ge in physiology. But you don't have a transformation of pleural thickening into disease.

For instance, pleural thickening or pleural plaques don't transform into cancer. It just doesn't happen. Those are two different processes. You don't have an individual who has the same thickness of pleura over a period of 20, 30 years, and suddenly one day they're diseased.

If there is progression of that pleural thickening or pleural plaque formation, it's possible that that individual may become diseased. But then you should be able to pick that up by the standard measures of pulmonary function.

Q. Does the presence of pleural thickening or the presence of pleural plaque act as a predictor of future disease?

A. No, it does not. Again, that's something that has been fairly extensively studied. In my opinion, after reviewing all the literature on this, I don't believe that that is a predictor.

I think an individual could possibly progress, but there is no prediction by looking at an individual's chest x-ray or looking at his pulmonary function tests or doing an examination. You can't predict who is going to change or progress and become diseased later.

* * * *

[Tr. 55] Between 1976, after the Act had been in place for a few years, between '76 and '79, when the exposures in the work place

were clearly much decreased, there's one half-year credit given for one year of exposure.

And after 1979, when — there was really very little exposure in the work place, there is no credit given for that period.

I think that's a reasonable type of decision to come to. I think looking at the exposures from a fiber count standpoint, from a regulation standpoint and from my own knowledge of speaking to large numbers of people who have been exposed to asbestos in the work place, I think that's a reasonable compromise to come to.

Now, in addition to that, the stipulation also says that if the work place can be shown not to have conformed to the Federal Regulations, but there is another adjustment made for that.

Once again, I think these are very reasonable standards to apply to individuals who are applying for compensation.

BY MR. BEERS:

Q. Under this agreement, evidence of exposure alone is not sufficient to make a diagnosis of asbestos related cancer?

A. That's correct. And I agree with that stipulation.

Q. And why?

[Tr. 56] A. For a variety of reasons. First of all, even if the individual were exposed in a major way, we know that most people who are exposed to asbestos do not develop any asbestos related change.

And right at the beginning of my testimony, I mentioned that my understanding of this document was to try to compensate people who were injured by asbestos and not compensate people who were not. Not everyone who's exposed to asbestos is injured.

So I don't think that exposure alone is sufficient to get to the point where an individual should be compensated.

Q. Dr. Epstein, I take it you have diagnosed cancers as asbestos related in your practice that would not meet the criteria that we've been talking about?

A. That's correct, I have.

Q. And how do you square that with your opinion that this is a reasonable agreement?

A. Well, look, I think that as I had mentioned earlier, no agreement with [sic] give you standard criteria for automatic payment in all circumstances that I would agree with. But this stipulation also talks about an exceptional medical panel.

In other words, if I feel that an individual has developed a lung cancer on the basis of his asbestos [Tr. 57] exposure, and he's not automatically compensated, this individual can come back to the exceptional medical panel and say, look, I think I was damaged by the asbestos, and the expert medical panel, the exceptional medical panel will review all of the data that's available, and under appropriate circumstances compensated that individual, even though he doesn't come under the automatic standards for compensation.

I think that's a reasonable compromise. We're talking about a document that is a compromise document, but tries to compensate as many people as is reasonable under the standard provisions and then allows for individuals to come back and apply different criteria under different circumstances.

Q. In conclusion on the subject of lung cancer, can you give us your overall opinion as to the reasonableness of the medical criteria?

A. My overall —

Q. Of lung cancer?

A. — improvement — excuse me.

My overall impression of the lung cancer agreement is that it is fair and reasonable.

Q. Now, let's turn for a moment to pleural changes. This agreement does not provide for compensation for evidence of [Tr. 58] pleural thickening or pleural plaques alone, does it?

A. Correct.

Q. And could you tell me what your opinion is as to the reasonableness of that?

A. Yes, I will. The fact is that in my opinion pleural thickening or pleural plaque formation in and of itself, does disrupt that individual's life in any way. And I think I had mentioned that earlier in my testimony.

I am not trying to compensate — excuse me — not me, but in my opinion, it is not appropriate to compensate someone simply because they have a change in the appearance of their chest x-ray. I don't think that is an appropriate thing to go, and I have said this many times in my prior testimony in the underlying cases.

I think that if the individual is damaged by the exposure to asbestos in a way that has produced the types of abnormalities that I have discussed earlier, then it's appropriate to compensate that individual.

Q. To what extent are your views of the subject of these pleural changes consistent with that in the medical literature?

MR. BARON: Your Honor, I object to that unless there is a foundation laid.

MR. BEERS: All right.

THE COURT: Yes. I'm not aware that the medical [Tr. 59] literature goes into who gets compensated and who doesn't.

MR.BEERS: You're absolutely right. I'll —

THE COURT: So if there —

MR. BEERS: — rephrase it.

THE COURT: — is a foundation, lay it. Objection sustained.

BY MR. BEERS:

Q. Can you tell us whether your views as to the significance of pleural thickening and pleural plaques are shared widely in the medical literature?

MR. BARON: I object again, your Honor, no foundation to medical literature. It's not —

MR. BEERS: If he knows.

MR. BARON: — referring to anything.

THE COURT: Overruled. The witness knows the medical literature. The question is it one seeking medical opinion and information, the objection is overruled.

THE WITNESS: Yes. My reading of the medical literature is that the majority of physicians who are knowledgeable in this area would agree with me.

Now, there are some physicians who feel that pleural changes will affect pulmonary function. There is that opinion out in the medical literature. But in terms of an abnormality that will affect the individual's life, I think that the majority of the medical literature would say the [Tr. 60] same thing that I did just now.

BY MR. BEERS:

Q. Are there other pleural changes that in your opinion can led [sic] to some sort of sickness or can constitute disease or however you want to define that?

A. Yes, there are. There are rare situations in which the pleural thickening is so great that it restricts the movement of the lung. That has a variety of medical names that are not really important here.

The fact is that readily the pleural thickening in and of itself can cause an abnormality of lung function, but that would be picked up by the pulmonary function testing.

Q. Is there a provision in this stipulation for compensation in circumstances of that type?

A. Yes.

Q. How about — can you tell the Court what a pleural effusion is?

A. Yes. A pleural effusion means that there is a fluid that has collected between the two layers of pleura. In other words, there is a fluid that leaks out of the lung or leaks out of the inside of the rib cage, and collects between the rib cage and the lung tissue, pushing the lung tissue out of the way.

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[Tr. 237] BY MR. MOTLEY:

Q. Doctor, I take it — would you characterize yourself as intimately involved in asbestos research?

A. Yes, sir.

Q. And do you attempt to read everything you can that comes out about asbestos?

A. Yes, I do.

Q. Do you find in this day and time, sir, that there are very many scientists who hold the view that asbestos exposure, by itself, standing alone with nothing else, no asbestosis, no bilateral pleural plaques, no heightened asbestos fiber tissue burden, no heightened asbestos body burden, just exposure standing alone, is sufficient to relate a specific lung cancer to asbestos exposure?

A. I would consider that to be an uncommon fringe viewpoint.

Q. Uncommon and what?

A. Fringe viewpoint.

Q. Fringe?

A. Yes, sir.

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[Tr. 4] THE COURT: I don't blame you. I saw Mr. Rosenberg on the street downstairs at 8:30 this morning, so he's had plenty of time to be here.

COUNSEL: Good morning, your Honor.

THE COURT: Good morning.

(Pause in proceedings.)

THE COURT: Mr. Motley, you may proceed.

MR. MOTLEY: Thank you, your Honor.

BY MR. MOTLEY:

Q. Now, Doctor, yesterday — I want to go back where we were, where we left off. You indicated yesterday that you understood from reading the stipulation what the objectors of the settling parties was, correct?

A. Yes, sir.

Q. Now, do you have an opinion based upon your review of the stipulation of settlement whether or not the objectors of the settling parties are accomplished in a way that's medically reasonable in the document, Plaintiffs' Exhibit 300?

A. Yes, sir, I do.

Q. And what is that, sir?

A. I believe that the settlement agreement encompasses most of the diseases that are asbestos-related and that it follows most of the current scientific literature and associating diseases with asbestos exposure and that overall that it was [Tr. 5] a fair agreement and that it is an inclusive agreement and in some ways, according to the thing as expressed in my book, it's even over-inclusive toward the plaintiffs' side.

Q. Would you elaborate on that, if you would, please?

A. Well, in that regard, I mean that there are cases in the settlement agreement that would be included and paid for that if this case — such cases were sent to me in consultation, that I would write back reports saying that I could not say that that case was

related to asbestos exposure to a reasonable degree of medical certainty.

Q. Doctor, in fact, on occasions have I sent you cases to look at from my firm and solicited your opinion — strike the word solicited — elicited your opinion as to whether or not there was a probable causal link between the disease and the asbestos exposure and you have sent me back such a report that in fact there was not such a link?

A. Yes, sir, on more than one —

MR. ROSENBERG: Objection.

MR. MOTLEY: I'll rephrase it.

MR. ROSENBERG: It —

MR. MOTLEY: I'll rephrase it.

MR. ROSENBERG: Your Honor, I object to the —

THE COURT: First of all, it's slightly leading but —

MR. ROSENBERG: Well, aside from the slightly

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[Tr. 36] concludes was not asbestosis, is on Page 76 of the article.

Q. Doctor, what is your — moving on now to a different subject. What if your opinion regarding the exclusion and the medical fairness of some benign asbestos related conditions such as asbestos as pleural effusions in cases of only pleural plaques without impairment from immediate cash compensation under the settlement agreement?

A. I think that that's a fair compromise that was arrived at in this agreement. I think that patients who have pleural plaques alone are generally as we've referred to previously, nonimpaired clinically.

I think that there are some epidemiologic studies that show some pulmonary function tests that can abnormal in groups of patients with pleural plaques. But in that regard, it's very important to realize that when you're looking at large groups, you can find changes that are statistically significant because you're looking at large numbers. But the changes of the individual may not be clinically significant.

And this is a point that's been brought there many times by Dr. W.K.C. Morgan. And the importance of that is that epidemiologic studies that show mild restriction, mild obstruction, whatever they show, do not necessarily imply that an individual, certainly the majority of individuals would have any clinically significant impairment.

Therefore, I think that it is fair that the system is set up so that these individuals — so that the companies don't have to pay for individuals who are unimpaired with pleural plaques. But nonetheless, these patients have the opportunity to come back into the system, if at some later date they should develop asbestosis, that is, shows clinical impairment. If they should develop pleural disease with clinical impairment, or if they should show up with any asbestos related malignancy at a subsequent time, that would qualify under this document.

And in that regard, the patients do not lose their rights to sue for a clinically significant impairing asbestos related diseases, because of time limitations or statute of limitations in this document.

Q. Doctor, did you examine the latency period requirements for nonmalignant diseases in this agreement?

A. Yes, sir.

Q. Do you have an opinion as to the fairness and reasonableness of such latency requirements?

A. In my opinion, they are overly inclusive about the criteria which I would use. The criteria which I use and refer to in my book for all asbestos related diseases is basically 15 years from initial exposure until the disease is diagnosed.

There are some historical exceptions to that. Individually people can show you cases where individuals have had relatively short latency periods with asbestos, but those were mostly exposures that took place at the turn of the century where the individuals developed diseases and died at say by age 30 of asbestosis. We don't see that any more. In all the cases that I've seen of asbestos related, nonmalignant asbestos related diseases have had latency periods of at least 15 years, so the document

having a latency requirement of 12 years I think is overly inclusive toward the plaintiffs.

Q. Dr. Roggli, yesterday when we were discussing the — your invitation to myself and Mr. Gurard (ph) who represents Pittsburgh-Corning, to submit to you for inclusion in your book, chapters on the various perspectives, plaintiffs' perspective in the — at least that defendant's perspective.

Did you serve in somewhat of an editorial fashion? I mean, did you review what we had written?

A. Yes, I did.

Q. And can you give the Court some idea of how frequently you meet with and consult with lawyers from my office on medical issues related to asbestos? Is it once a year or more frequently, or how would describe it?

A. I'd say it's very frequent, and it's both formal and informal. Formal in terms of reports that are written and specific questions that are asked, and informal occasionally by telephone calls where one of the lawyer's in your firm

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[Tr. 42] pathologists at the Riverside Regional Center in Newport News, Virginia, where because of the shipyards in those areas, those individuals have had considerable experience with asbestos related diseases.

Q. And Dr. Eugene Mark is at Harvard?

A. Yes, sir, at Masters of General Hospital in Boston.

Q. And Dr. Arnold Brody?

A. Dr. Brody is a Ph.d. research scientist who has done extensive work with asbestos related diseases and worked with me in animal studies at the National Institute of Environmental Health Science for almost ten years, and he's now moved to Tulane University.

Q. Keeping in mind and you went through yesterday with the Court, the controversy in the scientific community about whether it's asbestos itself or asbestosis, as a precursor and various spectrums in between that lead to causally connected lung cancer. Keeping that controversy in mind, do you have an opinion based upon a reasonable degree of scientific certainty as to whether or not

the lung cancer criteria contained in Exhibit 300, the stipulation of settlement, is fair and reasonable?

A. Yes, sir, I do.

Q. And what is that opinion, sir?

A. I believe that it is.

Q. And why is that, sir?

[Tr. 43] A. Well, first of all, lung cancers in my view are a dose response relationship to asbestos exposure. So that the —

Q. Explain that dose response for the record. I don't know that anyone has really gotten into that in any detail.

A. That means the higher dose, the more asbestos you're exposed to, the greater is your risk of developing disease. And that the association therefore, epidemiologically will be most clear in those who had the highest exposures, that is those patients who have asbestosis.

Cigarette smoking is obviously a very important co-factor in producing lung cancers, and in regard to cases of lung cancer occurring in nonsmokers, those are extremely uncommon in my experience. I've seen several hundred lung cancers in asbestos exposed individuals, I've only seen four that were nonsmokers that I felt that weren't contributed to asbestos exposure to a degree of medical certainty.

So the vast majority of the cases we're talking about that are going to be covered by this document will be lung cancers that occur in smokers or ex-smokers.

And the Surgeon General's report shows from 1990 that even though your risk of lung cancer goes down after you quit smoking, it never gets back to that of a lifetime nonsmoker even 20 or more years after you discontinue the habit.

So in terms of —

[Tr. 44] THE COURT: Excuse me, what never gets back?

THE WITNESS: Your risk of lung cancer never gets back to that of a nonsmoker. Lifetime nonsmoker.

So we're talking about individuals who have — were exposed to asbestos in this document and who get the disease lung cancer.

The information in the literature by and large indicates that for an individual who is a smoker or an ex-smoker that one needs to have asbestosis, to recognize a lung cancer as being asbestos related.

That there is some suggestion that increased asbestos levels may act as a surrogate, and I think we'll get to that at a later point and talk about that in more detail later, but that there is relatively weak scientific information to use that as a surrogate for exposure — as levels in the lungs as a surrogate for asbestosis in relating a lung cancer case.

And in my own personal view, the only cases of lung cancer that I would relate to asbestos exposure, that do not have asbestosis, would be those that occur in nonsmokers, which as I indicated, is a very rare circumstance.

In that regard, the document — the settlement agreement is overly inclusive by my own criteria in that individuals with pleural plaques alone and sufficient exposure of years in the trade, would qualify for compensation in this document, and there have been many such [Tr. 45] cases that I've seen in consultation in the tort system where I've written a report to the referring attorney, whether or not he was plaintiff or defense, that I said I could not relate such a case to asbestos to a reasonable degree of medical certainty.

So in that regard, I think that the — in fact, there are at least five different ways in this settlement that you can get compensated for lung cancer in an individual who's asbestos exposed.

One, is if you meet the clinical criteria for asbestosis in this document.

Secondly, you don't meet clinical criteria if lung tissue was resected or an autopsy is performed and you meet histologic criteria for asbestosis, then you're compensated.

BY MR. MOTLEY:

Q. You mean by that pathological asbestosis?

A. Yes. Histo — pathologic, pathologic, histologic, I use those terms interchangeable.

Q. How extensive does the document say the pathological asbestosis has to be in order to qualify?

A. It just says it has to be diagnoseable, and that includes the minimal lesion I referred to earlier, which is fibrosis, just around the airways —

Q. So —

A. — not involving extensively the lung substance, and with [Tr. 46] asbestos bodies in histologic sections.

Q. — so a person could go through life without ever having been diagnosed clinically of having asbestos, develop a lung cancer, have a lung resected, find minimal pathological asbestosis and still qualify?

A. Correct.

Q. Go ahead.

A. The third way that you can get compensated for lung cancer, is if the person meets the criteria for nonmalignant asbestos related pleural disease in the document. And such cases as those, who occur in smokers and ex-smokers, in my textbook, I would not be able to say it related to a reasonable degree of medical certainty. So I think that that's overly inclusive toward the plaintiffs.

The fourth way, if you don't meet any of those criteria, is if you have bilateral pleural plaques and sufficient years in the trade as indicated in the document, then you will qualify. And again, that's an area which in my textbook and in my testimony I have not been able to associate in the past to a reasonable degree of medical certainty.

Although, there is a new article in that regard by Dr. Hillerdal which suggests that that's pretty much right on target scientifically, the association with bilateral pleural plaque and lung cancer. And it just does meet probably, the [Tr. 47] minimal criteria that you can use to epidemiologically associate lung cancer with asbestos exposure.

Q. Excuse me, Doctor, I don't mean to interrupt you, but see if Exhibit 1204 —

MR. MOTLEY: And your Honor, I believe you have it in your book too, is the article by Hillerdal to which you just had reference so that the record will be complete.

THE WITNESS: Yes, sir.

BY MR. MOTLEY:

Q. And that's entitled, pleural plaques and risk for bronchial carcinoma, and mesothelioma, a prospective study by Gunnar, G-U-N-N-A-R, Hillerdal, H-I-L-L-E-R-D-A-L, is that correct?

A. Yes, sir.

Q. And by the way, was that — this article severely criticized by a Dr. Dorset Smith in an editorial that followed that?

A. Yes, it was.

Q. Go ahead, what was the fifth way?

A. The fifth way if you don't qualify by any of those criteria, you can still apply to the exceptional medical panel to see if you can demonstrate that there was comparable degrees of exposure to asbestos, and that might be an example for — may be a way, for example, if a patient had a lung cancer and a very high asbestos body or very high fiber count [Tr. 48] that for one reason or another, did not develop pulmonary fibrosis because there is variability from one person to another, as to whether or not they will get scars on the lung.

Then that person could apply to the exceptional panel, and five individuals on that panel, could then evaluate the total evidence available, the history of exposure, the radiographic pulmonary function test available, if they were done.

Pathologic information and asbestos fiber analysis, which include the laboratory who did it, the methods that were done, what they counted, what the results were and what control group they compared it to. And could then assess all that information to decide whether or not the case might still qualify as an asbestos related lung cancer, even though it did not meet the previously four criteria which I mentioned above, I think are overly inclusive toward the plaintiffs anyway.

[Tr. 49] Q. Doctor, do you understand that the exceptional medical panel can request or require additional testing be done?

A. Yes, sir.

(Pause in proceedings.)

MR. MOTLEY: Excuse me one second, your Honor.

(Pause in proceedings.)

BY MR. MOTLEY:

[Tr. 49] Q. Doctor, please turn to Page 324 of your book.

THE COURT: Exhibit number for the record?

MR. MOTLEY: 705, your Honor, I'm sorry.

Q. Do you have that there?

A. Yes, sir.

MR. BARON: 374?

MR. MOTLEY: 324.

MR. BARON: 24. Okay.

BY MR. MOTLEY:

Q. Would you explain that graph for the record, please?

A. Yes, sir. I think I mentioned this yesterday, is that we had studied 143 lung cancers, and divided them into 48 patients who had at least histologic asbestosis. Some of them had — many of them had clinically — clinical asbestosis as well.

Patients who had parietal pleural plaques, but did not have histologic asbestosis and there were 25 in that group, and 70 patients who had lung cancer with some history of asbestos exposure, but neither pleural plaque nor asbestosis.

And we analyzed the lung content for asbestos body and fiber counts in those particular cases, to compare the different groups. And what we found is that the patients with asbestosis, of course, had very high counts that averaged, as I mentioned yesterday, also 40,000 asbestos [Tr. 50] bodies per gram, but do extend down to as low as several hundred asbestos bodies per gram.

So we were interested in what was the 95 percent cutoff level or what is what we call the fifth percentile for asbestosis. So the dashed line in that graph is the fifth percentile for asbestosis, which means that 95 percent of our asbestosis cases fell above that dashed line.

We were interested in seeing how many of the cases of pleural plaques and of other lung cancers, how that related to the asbestosis

values. And what we found was several things, which I think are of interest.

First of all, I'll point out that in the epidemiology in the literature has had mixed results as summarized in Dr. Hillerdal's article, which was what, Exhibit 1204, I believe?

Q. Yes.

A. 1204, that some epidemiologic studies have shown an association between asbestos exposure and lung cancer with pleural plaques alone, and other have failed to show such an association.

And I think that this graph may indicate why. Because if lung cancer is due to asbestos exposure, the amount that you're exposed to, rather than to whether or not you've actually got the disease asbestosis, and that what one needs is levels of fibers or exposure that are equivalent to [Tr. 51] asbestosis to have a demonstrably increased risk of lung cancer. Then half of the patients with pleural plaques in this group would be asbestos related, half would not be asbestos related.

And that difference might be enough to keep any particular statistical study, epidemiologic study from reaching statistical significance, or it would result in some showing statistical significance and others not, because it's a borderline finding.

Dr. Hillerdal's study is in my opinion, the most complete and best controlled study and largest study of pleural plaques alone that has been reported so far. And in fact, Dr. Hillerdal is a world renown expert for studies in parietal pleural plaques. He did his Ph.D. theses on pleural plaque.

And this particular study, he followed several thousand patients for a couple of decades and found that when he had very strict criteria for pleural plaque, that is that they had to be bilateral. There had to be at least five millimeters of thickness or calcification that he could see, and there had to be no costophrenic angle blunting on either side.

With that strict criteria, he found that there was mild increase of lung cancer risk with pleural plaque alone, when he excluded asbestosis and when he controlled for [Tr. 52] cigarette smoking.

And what he found was about a 1.4-fold increased risk for pleural plaques alone. And that would indicate that that particular

group which has bilateral — I should mention that the group that I have here of 25 cases of parietal pleural plaques includes some cases of unilateral plaques which will not qualify under Dr. Hillerdal's study, and it probably includes some patients who had much less extensive plaques than Dr. Hillerdal indicated, and/or his entire group of patients who had bilateral pleural plaques. He only had a 1.5-fold increased risk. Now, that was with strict criteria for plaques.

If you included our cases with unilateral plaques and our cases with thinner plaques, it would not have met his criteria, then the risk, since those patients would have had on average a lesser dose, would be even less than the modest 1.4-fold increased risk which Dr. Hillerdal found.

Then the last group is the other group, and you can see that about 25 percent of the patients who had neither plaques nor asbestosis, with lung cancer, and some history of asbestos exposure, had asbestos body counts that exceeded those for asbestosis.

And first of all, there are no studies in the literature that has specifically addressed patients who lack pathologic asbestosis, who lack parietal pleural plaques and [Tr. 53] have lung cancer, to see if they have an epidemiologically statistically significant increased risk of lung cancer, when you control for cigarette smoking, and there's no evidence that that's the case.

So in other words, there's no epidemiologic evidence that people who meet the criteria in my other category, have an increased risk of lung cancer greater — other than that, that is attributed to by their cigarette smoking history.

And that even if you consider only those who have increased asbestos body counts, as I have indicated in this graph, there is at present no scientifically valid evidence that shows that asbestos fiber content in the lung tissue, including asbestos bodies, is an independent predictor of lung cancer risk when you control for asbestosis and control for cigarette smoking. So one would really need that information before you could use fiber counting to relate to lung cancer to asbestosis.

Nonetheless, I think the exceptional panel could cover some cases of lung cancer who had extraordinary levels of asbestos in

their lungs, and who for one reason or another did not meet the fibrosis criteria.

But I think that the criteria as they are in the settlement document, would include the vast majority of cases. As the settlement document stands, the criteria for [Tr. 54] the first line, I think, as you could call it, would include the vast majority of what I would consider to be asbestos-related lung cancers.

It includes some that I would say not be asbestos-related and provides a mechanism for cases that are questionable or border line to be at least considered for the possibility of compensation.

Q. Now, Doctor, you were here when Dr. Epstein was questioned yesterday about a report he wrote on a particular gentleman?

A. Yes, sir.

Q. Who did not have any evidence of asbestosis clinically or pathologically, yet he related that cancer to asbestos exposure, do you recall that?

A. Yes, sir.

Q. Had you been presented with that same information, what would your conclusion have been?

A. It's gets back to the same question of specificity versus sensitivity. The fact is that there is a 160,000 lung cancer cases, deaths in this country every year, and one of the best estimates we have from epidemiology that I've quoted in my book, is about 3,000 cases a year of lung cancer related to asbestos.

If you don't apply the strict criteria as present in this document, and you would include cases such as those — [Tr. 55] the one that you're referring to that Dr. Epstein described, then you would open the door to include all sorts of cigarette smoking-related cases that are not related to asbestos.

You might increase your sensitivity to 100 percent, but your specificity would be shot and I don't think that that's fair to the system, I don't think that it's fair to the companies.

Q. Well, Doctor, as an observer and a consultant over some time to both sides of the litigation in the tort system, as it relates to claims for asbestos and disease, do you have an opinion regarding whether this stipulation of settlement in its totality, if adopted by

the Court and affirmed by the Court's repeal, would represent an improvement over the manner in which you're familiar the tort deals with these sensitive medical issues?

MR. ROSENBERG: Objection, no foundation.

THE COURT: Grounds?

MR. ROSENBERG: A, it's beyond the scope of his expertise. He is being offered as an expert on medical issues. He is now being asked to contrast this stipulation of settlement with his experience in the tort system.

And secondly, there is no foundation that this witness is qualified to express such an opinion.

THE COURT: I'll sustain the objection on the basis [Tr. 56] of lack of foundation. And if there is a foundation laid, then I can decide whether his opinion is valuable to the Court under Rule 702.

MR. MOTLEY: I'll attempt to lay a better foundation and move on to another subject for right now.

BY MR. MOTLEY:

Q. Now, Dr. Roggli, over the course of the time that you have been involved in the tort systems efforts to resolve asbestos cases, have you heard asserted in the courtroom a defense called the cell — with respect to lung cancer, the cell-type defense, that is that only certain types of asbestos — excuse me — only certain types of bronchogenic carcinoma cell-types are caused by asbestos? Have you heard that at one time or another?

A. Yes, sir.

Q. Have you heard asserted in the tort system at one time or another that only lung cancers located in certain parts of the lung, that is the lower parts of the lung are asbestos-related?

A. Yes, sir.

Q. Have you heard asserted — we've already talked about the fiber-type defense.

Now, in the document, SP-300, have the settling parties left as a defense or as a confounding factor, or as a factor to be considered at all, the type of cell [Tr. 57] histologically in lung cancer?

A. No, that's foregone in this settlement.

Q. The sight of the tumor, that is where it's located in the lung?

A. No, that's not included in the settlement.

(Pause in proceedings.)

Q. You've discussed a lot about the asbestos and cigarette smoking and the relative contribution to lung cancer.

Sir, is there any evidence that there is any difference in the histological type of lung cancer caused by cigarettes as opposed to asbestos?

A. No. I've seen that defense used. I've seen it in cases where the patient had small cell or squamous cell cancer, the defense was it was caused by smoke. When the cases where it was broncho alveolar cell carcinoma, they said that type is rare and has not been associated with asbestos.

In cases of adenocarcinoma, I've seen it said that that is a scar cancer, and therefore is not related to asbestos, and that covers all of the cell types. So there' been defenses that have been built around all of the cell-types of lung cancer cases.

I've been involved in cases where it was alleged that it was — the case was a bronchogenic carcinoma, and although lung cancer has been associated, nobody has ever shown that bronchogenic carcinoma is related to asbestos [Tr. 58] exposure.

All of those defenses are eliminated and foregone in this settlement agreement. And there is no evidence that — there is no evidence — in my opinion, I think this should be eliminated because there is no evidence in my opinion and as outlined in my book, that there is any difference in cell type of lung cancers related to asbestos, as compared to those related to cigarette smoking.

Q. Now, sir, have you studied and followed in your professional career, the various efforts of the United States Government to control the use of asbestos, and in fact, to eliminate its use through outright banning?

A. Yes, sir, I have. In fact, the history of that is outlined in somewhat of a brief form in chapter two of my textbook.

Q. You indicated to the Court — you used the word dose response relationship, and the higher the dose, the greater the likelihood that a disease will occur and be related to asbestos, do you recall that?

A. Yes, sir.

Q. So what is your opinion of the effect, if any, of stricter government regulations beginning with the enactment of OSHA in 1972 and the initial banning of asbestos containing fireproof spray materials, and the banning of insulation products that contain more than one percent [Tr. 59] asbestos in 1975, on the opportunities for substantial disease causing exposures to asbestos in the '80s and '90s?

A. Well, my opinions on that, I think, are both related to — are related to theoretical considerations, to epidemiology, and to personal observations.

With theoretical considerations, and the understanding that asbestos is a dose response relationship, one would predict that the numbers of cases of clinically significant impairing asbestosis would decrease with stricter regulation of fibers in the work place.

And with the fairly close paralleling of lung cancer and asbestosis in populations, that lung cancer due to asbestos would also decrease with this regulation of fibers in the work place.

I think that correlates with epidemiologic studies. It shows that there is a dose response relationship for both asbestosis and lung cancer with respect to asbestos exposure, and also correlates with my personal observations, in that the number of cases — although the number of lung cancer cases which I've seen in consultation, may have stayed about the same.

The number of lung cancer cases which had histologically or clinically confirmed asbestosis, in my experience, has decreased in the past decade and a half that I have been looking at cases for asbestos litigation.

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[Tr. 61] THE COURT: I got confused about it, and I'm not convinced that it was leading. He just said are you aware of any studies that deal with the subject. That's how I viewed the question. If it was leading, I missed that.

But in any event, Mr. Motley, you're going to try it again. The objection is sustained just on clarity and complexity and possible inconsistency. How about that, Mr. Baron?

MR. BARON: I couldn't have said it better myself.

MR. MOTLEY: And compounding and confusing and convex.

BY MR. MOTLEY:

Q. Dr. Roggli, simply stated, sir, have there been studies that you're aware of in the very recent past few years which have attempted to determine whether or not there is a progression from the condition of pleural disease — start with that first — to a non-malignant asbestotic condition or an asbestos-related cancer?

A. Yes, sir.

Q. Pardon?

MR. BARON: Your Honor, I'm sorry, but I would object again unless he defines a non-malignant asbestotic condition as one being either qualifying or not qualifying, how it's impairing or non-impairing.

MR. MOTLEY: Under the terms of this agreement, your [Tr. 62] Honor, is what we've been talking about.

MR. BARON: Well, that's what I need to know.

THE COURT: It's not in the question. Try it again, Mr. Motley.

BY MR. MOTLEY:

Q. Dr. Roggli, you understand I'm referring now to the guidelines for compensation in the system that you've studied and testified about when I ask these questions, okay?

A. Yes, sir.

Q. Have there been studies in the recent few years which have attempted to determine whether or not people who were diagnosed at a certain time with pleural plaques only, over time progressed to where they had an impairing asbestotic condition or an asbestos-related cancer?

A. Yes, there have.

Q. And can you describe for the Court?

A. Well, we mentioned Dr. Hillerdal's study where he followed patients with pleural plaques alone over a period of a decade or two, and found that there was an increased risk of lung cancer, and there was also a tenfold increased risk of mesothelioma in those patients.

In addition, there was a study that was done and unpublished by Dr. Selikoff from Mt. Sinai where they studied a group of more than 1,000 insulators who had in 1963 a chest x-ray which showed pleural disease only, and followed those [Tr. 63] individuals for 27 years to see what happened to them.

And what they found in this group of insulators now, who had pleural disease only, no parenchymal disease by x-ray in 1963, is that 22 percent of those patients died of lung cancer, 18 percent died of mesothelioma, and seven percent died of asbestosis.

So that showed that almost half, a little less than half of patients who were insulators with pleural disease only, if you follow them for 27 years will die of an asbestos-related disease.

Q. So if Mr. Baron is quoted correctly in the record in this case in his opening statement to the Court, about deferral of pleural cases and he says pleural claims don't have to come in now, and that they could wait until they develop cancer which we all know they won't, is that scientifically accurate or not?

MR. BARON: Object. There's been no foundation. I wasn't talking about insulators.

MR. MOTLEY: Well —

MR. BARON: Which is very different than what he's just been describing.

THE COURT: People have said the insulators are special people because they have their high dose, I guess.

MR. BARON: Exactly.

THE COURT: In their face?

[Tr. 64] MR. BARON: Exactly. They face highest dose.

THE COURT: Well —

MR. MOTLEY: Well, what about Dr. Hillerdal —

THE COURT: I'll sustain the objection. We're not here to test Mr. Baron's — the accuracy of his opening statement. We know that when a lawyer makes an opening statement to a fact-finder that he can't prove, the fact-finder usually doesn't get too thrilled about that. Mr. Baron will have to live with that, like every lawyer does who makes an opening statement anywhere.

MR. MOTLEY: I know, your Honor. I just like to remind him of it sometimes.

BY MR. MOTLEY:

Q. Dr. Roggli, some of the other studies, did they deal with trades other than insulators?

A. Yes. Dr. Hillerdal's study covered a wide range of individuals with pleural plaques and only a relatively small percentage of those patients were insulators.

Q. And is there another study by Dr. Miller?

A. Yes.

Q. And did it cover more than just insulators?

A. Yes, sir.

Q. A final question I want to ask you and hopefully I can phrase this right, your Honor. I've been trying to do it for

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CROSS EXAMINATION

[Tr. 140] BY MR. ROSENBERG:

Q. Dr. Roggli, in the five ways that a person can qualify —

THE COURT: Talk about the fifth way, that's what you're asking about. Either get on it, or get off it.

MR. ROSENBERG: I'm going to get off it. Actually I'm going to get off it.

BY MR. ROSENBERG:

Q. I want you to consider all five ways that you've said, and I want to ask you this.

Will the person who have very heavy exposure to asbestos dust from occupational exposure to asbestos and who has a lung cancer,

will that person fit within any of the five ways that you qualify for money under the terms of this settlement?

A. Yes.

Q. And which way would it be?

A. The term that you used, very heavy occupational exposure, is one that probably would have different meanings to different people. And so it's difficult to pinpoint, but I'll tell you at least the way that I see it, and would understand this document.

One as I mentioned earlier, this is the question of sensitivity and specificity that you want to include the cases that are related to asbestos. And I think that the [Tr. 141] document by showing asbestosis and parietal pleural plaques and years in the trade, is a requirement of association with lung cancer, fits most of the scientific communities concepts in this area.

And that the lung cancer requirements in this particular case, that there are two — well, there is no way that any particular document can anticipate every possible case that would come up with any criteria that you've set up. So that there are possible patients who would fit into what I would consider a very heavy exposure to asbestos, who would not meet the criteria in the document, it would then be considered by the exceptional panel.

Two examples that come to mind would be a patient who had radiographic evidence that was strongly suggestive of asbestosis, and say for example 2/1, and bilateral — well, let's say unilateral pleural plaques. And had years in the trade and had a lung cancer, but had no tissue available, and who had pulmonary function tests which did not show the restriction.

And such a case would not meet the non-malignant criteria for asbestosis, but such a patient could then be considered by the panel to see whether or not there is sufficient evidence for asbestosis in the case, in spite of the patient having coexistent emphysema for example, which would still allow compensation. That would be an example of [Tr. 142] a patient for which no pathologic material was available, they could go to the exceptional panel.

An example of a patient where tissue was available, they could go to the exceptional panel, would be one that I indicated earlier. A patient who has a resection for a lung cancer, who has asbestos

bodies in histologic sections, who has a heavy burden of asbestos, but for particular reasons did not develop peribronchial or fibrosis or asbestosis.

That patient then could go to the panel for the question of does this patient have a very heavy exposure to asbestos as manifested by tissue asbestos burden, in spite of the fact that he does not meet the histologic criteria for asbestosis.

And that case, of course, would also have to not meet the requirements which would get it automatically in, that is a bilateral pleural plaques and years in the trade. But that case could then get to the exceptional panel.

Q. How about the man that just has heavy exposure to asbestos, none of those changes that you've talked about, nonsmoker, lung cancer, that's it. Does he get paid?

A. It says another exam I think that we referred to earlier of a patient who has lung cancer and a — with heavy exposure, and a nonsmoker, which if there was evidence of increased tissue asbestos burden, in my opinion, that would be related to asbestos and that I would [Tr. 143] push for that in the panel, realizing — that it's an exceptional panel — realizing it's a controversial area, and it may or may not get by a panel in that particular circumstance.

Q. Now, the editorial that you wrote some page — I'm sorry, was Exhibit 1201, is that correct?

A. Well, I believe so, yes.

Q. And that was in specific answer to Dr. Churg's editorial, is that correct?

A. Yes, sir.

Q. And Dr. Churg is of the opinion, and I believe he has testified by way of videotape in this court, not I believe, I know he has, and the Court has been provided with his transcript, but Dr. Churg is of the opinion that you cannot have a lung cancer attributed to asbestos in the absence of asbestosis, correct?

A. Yes, sir.

Q. And that is not your view, isn't that right?

A. I'm in essential agreement with that, with respect to patients who are smokers, who — or are ex-smokers. But I disagree with

him on the philosophy that it's the fibrosis that's the precursor lesion. I do disagree with him on cases who are nonsmokers.

Q. Now, it is your belief that the process of fibrogenesis and the process of carcinogenesis are two different things

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[Tr. 156] BY MR. BARON:

Q. Dr. Roggli, in your opinion, are there people who have mixed defects, in other words, they have asbestosis and then some other dust disease that will equalize out their pulmonary function test to read normal, even though they have severe disability?

MR. HOUFF: I object.

THE COURT: Overruled.

THE WITNESS: It equalize out total low capacity. It will not equalize out pulmonary function test to give a normal result of pulmonary function, no, sir.

BY MR. BARON:

Q. Well, their force vital capacity could be normal, could it not?

A. Force vital capacity would go down in either obstructive or restrictive lung disease.

Q. If they are cigarette smokers and have that?

A. If they are cigarette smokers and have exposure to asbestos dust, and have obstructive and restrictive lung disease, force vital capacity will be decreased by both and will probably be additive.

Q. Doctor, on Chapter 6 of your book where you talk about benign asbestos related pleural disease, it begins on Page 165.

A. Okay.

[Tr. 157] Q. You state that benign asbestos pleural related — excuse me, let's start it over. You state that benign asbestos related pleural disease are the most common pathologic and clinical abnormalities related to asbestos exposure. When you say the most common, does that mean that more than 50 percent of the people that have asbestos-related diseases have pleural only?

A. It's certainly the plurality. The question is, is it the majority. And a response to that would be a guess, but based on my own experience I would say probably a majority; definitely a plurality.

Q. A plurality of pleural?

A. Plurality of the pleural.

Q. Okay. And, Doctor, you have stated that there are four different forms of pleural disease: parietal pleural plaques, rounded atelectasis, diffuse pleural fibrosis and benign asbestos effusions. Are all four of those categories of diseases excluded from payment under the settlement stipulation?

A. Not entirely, no, sir.

Q. Which ones are included?

A. Parietal pleural plaques are included if the patient subsequently develops a malignancy.

Q. Okay. Well, assume with me that the claimant only has one of those four or any one of those four diseases. Are those

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[Tr. 163] THE COURT: Will there be any redirect?

MR. MOTLEY: I have one minute, your Honor.

THE COURT: Well, let's get it done. We've got to get the doctor out of here so he can do something else, if he wants.

REDIRECT EXAMINATION

BY MR. MOTLEY:

Q. Dr. Roggli, is there uniformity, that is, a unanimous voice of medical science on anything to your knowledge that you have experience with.

MR. BARON: Your Honor, I object. That encompasses every single item of medicine. He hasn't limited it at all.

MR. MOTLEY: Well, I don't intend to limit it.

THE COURT: Overruled.

THE WITNESS: It'll be hard for me to think of an area of medicine for which there is complete uniformity of agreement of diagnostic criteria.

BY MR. MOTLEY:

Q. Now, Doctor, in conclusion, would you look at Page 45 of the stipulation, please?

(Pause in proceedings.)

Q. This is in regard again to the exceptional medical panel and I'm looking at about midway down the sentence that reads, "In applying the standard, the panel may take into consideration all aspects of the exposed person's medical [Tr. 164] history and condition." Do you see that, sir?

A. Yes, sir.

Q. These circumstances that Mr. Baron went through with you where the results of a particular test may be skewed by the concomitant existence of two different disease processes, are those the kinds of things that the exceptional panel can take into consideration in deciding whether an individual in fact suffers from asbestosis?

MR. BARON: Your Honor, I object unless he asks whether it's his opinion as opposed to whether that's what it actually says because there's obviously a dispute over what it says.

BY MR. MOTLEY:

Q. In your opinion, are those the types of disputes or the types of circumstances that the exceptional medical panel could take into consideration in evaluating and assaying the merits of an individual's case for an asbestos-related disease?

A. It gets back again to the question of sensitivity versus specificity. If you set your — an example that was given of a pulmonary function test in a patient who had otherwise typical radiographic findings of asbestosis, one could easily conceive of individuals who had increased markers on chest x-ray due to emphysema who did not meet the functional requirements in this document because he had obstructive lung [Tr. 165] disease who did not have asbestosis but would be compensated if you relaxed the criteria that required restrictive disease to be present.

So in that circumstance, it provides a mechanism for the panel to evaluate and closely scrutinize a case that has concomitant obstructive disease to see if there is a balance of evidence that

supports a patient in fact has asbestosis which is causing his disability and his symptoms.

And I think that the exceptional medical panel provides the mechanism to assess such a case to make sure that you aren't overly inclusive and include every patient who has increased markings emphysema, a well-recognized entity in the pulmonary literature and that you don't exclude a patient with asbestosis who happens to also to have severe emphysema.

Q. One final thing, Doctor. If you — you stated there were 3,000 asbestos-related lung cancers over the next several years, correct?

A. Yes, sir.

Q. And that goes back a few years ago, too, correct?

A. Yes, sir.

Q. Would you have any explanation you could offer the Court medically or from what you studied in this document why the CCR over the last three or four years has only received 1,000 lung cancer claims per year?

* * * *

TESTIMONY OF JOHN FREEMAN

* * * *

[Tr. 108] MR. MOTLEY: Let me repeat the question that led to the discourse we've just had.

BY MR. MOTLEY:

Q. You have been made aware, as you've stated, of the allegations of impropriety surrounding the January 14th inventory settlement agreement, Exhibit 302A, correct?

A. Yes, sir.

Q. And you have studied that and for all the reasons, and I hope we don't have to repeat them again on the record, you have formed an opinion about those allegations, have you not?

A. Yes, sir.

Q. What is that opinion, sir?

A. The opinion is that the Ness, Motley firm has not entered into an unethical, improper, lock-out agreement with CCR in its dealings as to the disposal of the — or settlement of the Ness, Motley inventory cases or in any way related to the Georgine settlement, that there is no ethical impropriety, is specifically no violation of 5.6B.

That's my opinion.

Q. What is the basis for that opinion, sir?

A. The basis for the opinion —

THE COURT: He just gave it at length.

MR. MOTLEY: Well, he told us what he relied on, your Honor.

THE COURT: I assume.

[Tr. 109] THE WITNESS: I incorporated by reference my prior testimony.

(Laughter.)

MR. MOTLEY: I just wanted to make sure it was clear on the record.

THE WITNESS: Let me add this. That if you single out of this voluminous record and if you zero in on one specific paragraph of the document that is at the front of 302A, and that is the document dated January 14th, you can well make an argument that taking that language in isolation and not in the context which I see, that that language would support a charge that it impermissibly restricts counsel's right to practice.

However, when it is taken in the context of all that I have seen and read and heard in this courtroom, it is not an impermissible lock-out agreement and there is no ethical impropriety.

(Pause in proceedings.)

BY MR. MOTLEY:

Q. Sir, at some point in time, did Objectors Exhibit 050 on Opinion ABA, Advisory Opinion, come to your attention?

(Pause in proceedings.)

A. Yes, sir.

Q. And how was that brought to your attention?

A. It was brought to my attention by your firm and it came [Tr. 110] to my attention some time after the opinion was published.

Q. I'm —

THE COURT: That's the ABA Opinion of April 16, 1993?

MR. MOTLEY: Yes, your Honor.

THE COURT: ABA Formal Ethics Opinion 93-371?

MR. MOTLEY: Yes, sir.

THE COURT: Fine. I just wanted to get it on the record.

BY MR. MOTLEY:

Q. Were you consulted by us about that particular opinion?

A. I was — yes, I was.

Q. And what if anything did you recommend that we do?

(Pause in proceedings.)

A. I was at the time also made aware or around that time made aware of the language in the January agreement which I recognized

could be interpreted in isolation as a lock-out agreement which I came to understand did not fully reflect the parties' intent.

And I counseled the firm to enter into a mandatory language to more accurately reflect the understanding of the parties.

Q. Are you familiar with the attachment to SP-302A which is a June, 1993 agreement?

A. Yes, sir.

[Tr. 111] Q. And the — it says, "This agreement is executed by and between the Center for Claims Resolution, as sole agent for its members and Joseph Rice of the law firm of Ness, Motley hereinafter referred to as plaintiff's counsel individually and as agents for and on behalf of plaintiff counsel, this agreement supersedes all prior agreements by and between these parties which relate to procedures for handling future claims specifically including the agreement of January 14th, 1993."

Is that the language to which you have reference, sir?

A. No. The language to which I have reference —

(Laughter.)

A. — really — this is the agreement, you've identified the agreement.

Q. Okay.

A. But that isn't the language.

Q. It sounded pretty good to me.

(Laughter.)

Q. What did you have reference to there?

A. Specifically Paragraph 2.

Q. Okay.

MR. MOTLEY: Your Honor, do you have that in front of —

THE COURT: Paragraph 2 of the June agreement?

[Tr. 112] MR. MOTLEY: Yes, sir.

(Pause in proceedings.)

BY MR. MOTLEY:

Q. Sir, do you have an opinion based upon that degree of certainty that we've identified in the record as to whether or not the June, 1993 agreement with CCR violates any ethical rules and in particular Rule 5.6B?

A. I do have an opinion.

Q. And what is that, sir?

A. It does not.

Q. Why?

A. Because it's not a lock-out agreement by any way, shape or fashion. It calls upon counsel to use counsel's best professional judgment in advising its clients as to what counsel would consider to be an appropriate course of action. It leaves counsel free to represent its clients in the event the client would choose not to embark on that or follow that advice and it's just flat not a lock-out agreement, period.

Q. Sir, do you know whether or not — has it been brought to your — strike that.

Has it been brought to your attention whether or not an agreement similar to this has undergone judicial scrutiny?

A. Yes, sir. And that's — that would be Judge MacQueen's analysis in a West Virginia proceeding some time after this document was executed, June or July of '93.

[Tr. 113] MR. MOTLEY: Your Honor, this is SP-1028.

THE COURT: I have it. MacQueen is M-A-C capital Q-U-E-E-N, for the record.

MR. MOTLEY: Yes, your Honor.

THE COURT: I'm just giving the court reporter some help.

BY MR. MOTLEY:

Q. Have you reviewed Judge MacQueen's opinion, sir?

A. Yes.

Q. And what if anything of importance do you find that it imparts to you in regard to the issue of any ethical improprieties related to Rule 5.6?

A. Well, specifically his order which is part of 1028, SP-1028, has a specific finding starting in — at the beginning of Paragraph 4, reviewing the settlement agreement dated June 10, '93. That the agreement doesn't violate 5.6B of the West Virginia Rules and he goes on to explain that. I share his view.

Q. Do you also find in SP-1028 that the Court in addition to issuing a written order made a record, own record oral remarks regarding the matter of the allegation of unethical conduct involving the June, 1993 agreement?

A. Judge MacQueen did that according to this transcript.

Q. Does Judge MacQueen — have you reviewed that?

A. I've seen the transcript and I have reviewed it, yes, [Tr. 114] sir.

Q. And does it refer to the history of asbestos litigation?

A. He take — as I think is appropriate, analyzes in part this settlement in the context in which it arises which is asbestos litigation of — going back years. He analyzed it as well in light of the ABA Ethics Opinion, 93-371. And he takes the opinion that I take that there is no improper lock-out agreement.

Q. Do you find of any usefulness to yourself in forming your expert opinions of Judge MacQueen's statements about even the making of such allegations?

A. Judge MacQueen's entitled to his opinion. It's a free country and people are entitled to make whatever charges they want. I happen to share his view on the product and that is that there's no ethical impropriety, period.

Q. Did you see the language by Judge MacQueen that "I am astounded frankly that this question has ever — has even arisen"?

MR. BARON: Your Honor, that's leading.

THE COURT: I don't know what purpose that serves.

Sustained.

MR. MOTLEY: We move SP-1028 into evidence, your Honor.

MR. BARON: If it's not being offered for the truth of the matter stated therein.

[Tr. 115] MR. MOTLEY: Well, your Honor, it's a judicial order on the issue in question before the Court.

THE COURT: It's only for the truth of the fact it was issued and that Judge MacQueen has these views and that they are things which the witness has said customarily relied upon by a person in his position when making such an analysis. They certainly aren't binding on this Court. That's the only basis on which I'd received them is that they were issued. There may be 50 opinions out there that he hasn't found. Maybe I'll find some, I don't know. But this is standard fodder for these kinds of cases and I'll receive it for that limited purpose.

(Settling Parties Exhibit 1028 received in evidence. [sic]

BY MR. MOTLEY:

Q. Let me ask you this, Professor Freeman. In the course of your investigation, have you determined whether any court that handles asbestos cases has analyzed the June, 1993 Ness, Motley agreement and found it was a violation of Rule 5.6?

A. If there is such a court, I don't know about it.

THE COURT: Counsel, we're going to have a noon recess.

With respect to this afternoon, we're going to finish at 4:30 as we usually do. And I don't know that we have any pleasant plans to extend that time for arguments or other — other than to state the schedule for tomorrow. I [Tr. 116] think we should be prepared to leave the courtroom at 4:30. If we have other obligations, we might make those plans.

BY MR. MOTLEY:

Q. Professor Freeman, let's turn to a second issue and that is the contention that class counsel had an impermissible conflict of interest.

In your opinion, based on the degree of certainty that we have described, did class counsel have an impermissible conflict of interest in proceeding to negotiate the Georgine settlement by

continuing to represent present claimants as defined as persons who had cases in the litigation system?

A. In my judgment, there was no conflict of interest that would bar counsel from so acting.

Q. Why not?

A. Counsel was not required in order to enter into negotiations with CCR and entertain the possibility of a Georgine settlement to fire or dismiss or terminate its [Tr. 118] existing attorney-client relationships with its existing inventory of cases.

Counsel was entitled to explore other possibilities at the time it was representing cases in the litigation process. In the case of Ness, Motley, this was thousands of clients and thousands of cases. For Ness, Motley to fire or be required to fire or dismiss or discharge these clients and force them to start afresh with new counsel, not familiar with their cases whom they did not seek, to me would be the height of professional irresponsibility.

Ness, Motley would have to obtain from each of these clients consent and in my judgment Ness, Motley wouldn't have reasonable grounds for seeking that consent in the first place because purely the opportunity to obtain other employment or more lucrative employment in the same line, say, as class counsel to me is not a valid basis for seeking to terminate or dismiss an existing client who has come to you and entrusted that client's affairs to you. That just is not good cause to terminate the relationship.

Furthermore, to the extent that we are dealing here with pending cases, the custom is that for counsel to terminate representation in those cases, counsel needs to appear before the tribunal and move to be relieved as counsel and I cannot imagine judges across the country willing to allow Ness, Motley to shirk its responsibilities or terminate [Tr. 119] its obligations to existing litigants on the ground that it seeks to enter into negotiations with somebody like the CCR. That to me is absolutely uncalled for and not necessary at all.

So then the question is, can you become class counsel even though you have present cases along the same line or against the same defendant and the answer to that in my mind is certainly yes.

Q. And why is that, sir?

A. Because it happens. Counsel develops expertise in a certain area and may have the opportunity at some point to turn an existing case into a class action or undertake to represent somebody who would be a representative party for — in a class action and so long as the interest of the present client who may not be a class representative, may be an individual case, is protected as it needs to be by counsel and so long as the interests of the class are protected in what may turn out to be a class action lawsuit, as long as that happens, counsel is free to act.

Counsel can have multiple clients against a common defendant in multiple forums in multiple forms.

Q. Are you familiar with the line of cases commonly under the style *Cippollone*, C-I-P-P-O-L-L-O-N-E, *versus Liggett and Myers*?

A. I'm familiar with the cigarette litigation, yes, sir.

[Tr. 120] Q. And are you familiar with a decision by U. S District Judge Leckner (ph) on a motion by the lawyers who handled the *Cippollone* case to withdraw?

A. I'm familiar with his order denying their right — their request to withdraw on the basis of financial hardship.

Q. Have you looked at the deposition of Professor Crampton and Professor Coniak and the report that they jointly issued on January 31st?

A. Yes, I have.

Q. Sir, in your opinion, would the suggestion that Mr. Locks could have given his cases, present cases away to somebody else and then free to negotiate the futures class action as opined by Professor Crampton consistent with ethical standards of practice?

A. No. In my judgment, for Mr. Locks to do that or for your firm to do that would be highly improper to abandon those clients and leave them in the lurch that way.

Also, you could possibly negotiate a settlement with CCR. I think that that's irresponsible and unprofessional to suggest that.

Q. Are you familiar with Professor Coniak's suggestion that Ness, Motley could have tried every one of the 20,000 cases that we represent but not settled any of them and then it would have been

permissible for us to at the same time conduct negotiations with CCR for a futures settlement?

[Tr. 121] A. I believe it would be —

MR. HENDERSON: Excuse me. Objection, your Honor. I assume that's in the form of a hypothetical?

MR. MOTLEY: Yes.

THE COURT: Has to be. Sure.

MR. MOTLEY: Yes.

BY MR. MOTLEY:

Q. I asked the question.

A. I would believe it would be improper to insist or require counsel to try all an existing inventory of cases prior to entering into settlement negotiations. That would be a lock-in as opposed to a lock-out that would I think improperly restrain counsel's freedom of action and the client's freedom of action. Sometimes we know that many cases are settled.

(Pause in proceedings.)

Q. Sir, let me ask you a different question. Did class counsel have an impermissible conflict in settling the present cases while proceeding with the Georgine negotiations?

A. No.

Q. Why not?

A. Because class counsel had existing clients and had a fiduciary obligation to those existing clients to obtain for those existing clients what counsel considered to be the optimum recovery for those clients, whether that was by way [Tr. 122] of trying every case, trying some of them or settling.

If counsel reached the decision that it had a very good opportunity for those clients and an opportunity that clients wish to avail themselves of, it was counsel's obligation to go ahead and settle those cases.

At the same time, when counsel's negotiating as potential or prospective class counsel, counsel had an obligation to negotiate in good faith and reach the best result that it possibly could on behalf of the class yet to be formed.

And I don't see that there's any impropriety on either side of that.

Q. Do you know, sir, whether or not the — what we've come to call the inventory settlement of present claims is contingent upon Georgine being upheld by this Court and affirmed and thereby implemented?

A. It is not contingent.

Q. Did CCR's settlement position which the record reveals provided that CCR would not consider inventory settlements until some futures arrangements were probable, did that create in and of itself an impermissible conflict of interest?

A. I don't believe it did.

Q. Why not?

A. Well, for these reasons. First of all, that's CCR's [Tr. 123] position and that's their — that's their settlement goal and they're entitled to whatever position they want to take. The issue is what does that translate to in terms of the behavior of counsel and what does that translate to in terms of ethical propriety.

The record that I have seen and with which I am familiar in this case shows that the Ness, Motley firm for example received what a reasonable person could consider to be objectively — an objectively fair settlement for its existing inventory of cases. A settlement that's been reviewed by Professor Burbank, a settlement — numbers that have been supplied and talked about in this court and a reasonable person could conclude that based on historical averages, et cetera, the interests of those clients were well served.

A reasonable — a reasonable observer, I believe also could in evaluating the Georgine settlement and in evaluating the terms of the Georgine settlement as they've been presented in this courtroom, conclude that the Georgine settlement is fair, reasonable and adequate and provides valid and valuable con — consideration to the class members in the Georgine class.

And with that settlement standing on its own, and my position from day one as an observer and to some extent a commentator has been that there should be no linkage between [Tr. 124] these possible arrangements, that they should each be able to stand the

light of day on their own merits and be objectively fair and reasonable.

In the case of the — CCR's position, I know it's been voiced that there was a dealing on the presents in exchange for commitment as to the futures. That commitment translated to recommendations by counsel. I think that that was proper. It was — that position was taken by CCR in the light of a long history of asbestos settlements including inventory settlements and including court-facilitated pleural registries and I see this entire process unmarked by any taint of ethical impropriety in terms of conflict of interest or sell-out or whatever you want to call it.

Q. Did class counsel breach their affable — excuse me, your Honor — their ethical obligations to the Georgine class by not disclosing the fact of the inventory settlements to them at the time the inventory settlements were negotiated?

A. The answer is no.

Q. Why not?

A. Because there was no Georgine class at the time of the inventory settlements.

Q. Did class counsel have an obligation to disclose to their present clients the fact that they were negotiating the Georgine class action for future claimants?

A. No, they did not.

[Tr. 125] Q. Why not?

A. Because those are two separate, although to some extent simultaneous, pieces of representation. A lawyer is not obliged and in fact is prohibited from disclosing to Client A what the lawyer may be doing for Client B or intending to do or possibly be doing for Client B. And I don't believe that any disclosure was called for.

Q. Much has been made of the fact that the Complaint and stipulation of settlement were filed on the same day. And I believe that's been proven to be so. They in fact were filed on the same day. Does that simultaneous filing in your opinion indicate collusive or impermissible behavior on the part of class counsel?

A. No. What it indicates — the answer is no.

Q. Why not?

A. Because what it tells me is it's a settlement class action and to say that it's impermissible to have a settlement class action is to create an ethical wrong that I've never seen before. You have prepackaged bankruptcies but — and resolved almost simultaneously. The *Raymark-Wells* case was a settlement class action. This phenomenon can occur without ethical impropriety.

Q. Are you familiar with the other settlement class actions?

A. With the *Wells* case?

Q. With other than *Wells*?

[Tr. 126] A. There have been other cases where settlement has been — has occurred prior to class certification and there's commentary in the cases about settlement class action. You have Judge Russell's opinion in the *Aetna-Dalcon Shield* case where he seems to applaud settlement class actions.

Q. That's in the Fourth Circuit.

A. You've got the — Fourth Circuit case.

You've got the beef industry case where they talk at some length about settlement class actions.

Q. That's the Fifth Circuit?

A. It's either Fifth or Eleventh, I forget which way it was at the time the opinion was rendered. But certainly there's precedent for this. I've mentioned several times the *Wells* case involving your own clients.

Q. Does the fact that pleural claimants who have — who may have been unimpaired — let me strike that.

Does the fact that some of the Ness, Motley and Locks, Greitzer and Locks inventory settlements included pleural claimants who may have been unimpaired but received cash compensation whereas such similarly situated unimpaired pleural claimants received different rights but no cash under Georgine indicate that class counsel were under — acting on their impermissible conflict of interest when negotiating Georgine?

A. No, it does not.

[Tr. 127] Q. Why?

A. First of all, I want to clarify something. You said they received no cash. They received no cash immediately. They may receive cash down the road.

Now, let me explain my answer. The firm had an inventory of cases that it had on hand. It had claimants who had gone to Ness, Motley and the tort system or Greitzer and Locks, the same thing, and had a realistic expectation that their cases were going to be resolved in the tort system. And that means resolved either by a judgment or by settlement.

And in settling those cases on terms which were considered advantageous to those clients, certainly there's no impermissible behavior there, and the pleural-unimpaired, as I understand it, did receive consideration in the conventional way that they have traditionally been receiving it in the tort system with this exception.

In the tort system there had been pleural registries and there had been green cards in the past. For instance, one of Objectors' Exhibits is Mr. Fitzpatrick's article in our long contemporary problems where he references the experience of the ACF, the Asbestos Claims Facility.

Now, in the case of the ACF, what's interesting in that article is that he refers to 18,500 dispositions of asbestos cases by the Claims facility. Of those 18,500 — [Tr. 128] and this is in the tort system — of those 18,500, the numbers in his article, Footnote 3 in accompanying text, reflect 5,000 or so of those cases being disposed of by pleural registry or green card.

Which is to say that even in the tort system, deferral of a pleural unimpaired's claim was a recognized way of resolving that claim. It's not as if everybody who is unimpaired has always gotten paid in the tort system and in fact, the article reflects it in '88 half of the cases resolved by the ACF were resolved by green card or pleural registry.

Now, those weren't cases resolved by green card or pleural registry with class counsel or anything of the nature, that was just the free market at work.

What about the pleural unimpaireds under Georgine? To my understanding, the pleural unimpaireds under Georgine absolutely

are not relegated to a position where they don't get paid or have no rights, et cetera.

What they are receiving, whether you call it a bundle or basket of rights, however you phrase it, is tangible rights, so far as I'm able to determine, to any similar set of rights, green card, pleural registry, that deferred pleural unimpaireds have ever received in the tort system, with the right of double re-entry, waiver of the [Tr. 129] statute of limitations, et cetera, being key to that.

Reduced counsel fees, some assurance that the money will be there to pay them, a waiver of liability.

And, a reasonable person in my judgment could conclude that that is an attractive and indeed very valuable set of rights, and here's how I analyze it.

In the case of a pleural unimpaired, who is being treated in the tort system and gets cash, without any manifestation of disease, that pleural unimpaired upon receiving cash and giving a release to the settling defendant, becomes self-insured. They win the lottery and never get a disease.

They may get a disease, a very disabling or fatal disease, but they got paid early on and they're out of the system at least as to that defendant.

In the Georgine settlement, what you've got is CCR in essence being the insurer. With CCR standing ready with the money to pay these people, when, as and if they get ill, and qualify under the Georgine standard.

Now, I read Susan Oliver's deposition on the point of people coming back into the —

Q. You mean Christine Oliver.

A. Christine, I'm sorry. Christine Oliver's deposition, and she talked about a substantial percentage of pleural unimpaireds who later manifest serious disease. Dr. Roggli, [Tr. 130] I'm not — I wasn't here for his testimony, that's on the record. My understanding is that he gave somewhat similar testimony referring to a study by Dr. Selikoff.

The fact of the matter is, you've got Mr. Annas who was here, whose wife at one time was a pleural unimpaired, but who later

died of mesothelioma. In a sense she's kind of a part of this proceeding, at least the story about her is, and that testifies that it's not just a hypothetical possibility or a remote — kind of fictitious possibility that down the road people are actually are going to stand ready for these benefits? They are going to be available, some of these people, depending on your percentage to be paid.

And so I don't think you can say that there is improper disparity in treatment. There's a different emphasis between the pleural unimpaireds who get cash up front and those who have their rights preserved, with in essence an insurance policy down the road. To me that's a very valuable right. Class member vote thought it was a valuable. Class member Georgine thought it was a valuable right. Class member Annas thought it was a valuable right. The people who took the 5,000-plus green cards from the ACF thought it wa a valuable right. The Baron and Budd client who took the green card that's been talked about, Stolpa (ph) in this proceeding thought it was a valuable right. And a [Tr. 131] reasonable client and lawyer could think it's valuable.

I do think that the Georgine basket is better than even the green card or the pleural registry in fact by far.

Q. In conclusion, Professor Freeman, based on your entire review of the record as you've previously described it, in your professional background, do you have an opinion as to the overall ethical propriety taken in its totality of class counsels' conduct with respect to the negotiation and presentation of this matter to this Court?

A. Yes, I do.

Q. And what is that?

A. That it's superior, it's a professional performance, on all standards, competence, diligence, loyalty and particularly ethics.

Q. Any evidence of collusion?

A. Not that I know about.

MR. MOTLEY: Your Honor, Mr. Miller has a few questions, and I pass the witness to him. Thank you.

MR. MILLER: May I proceed, your Honor?

THE COURT: Yes.

BY MR. MILLER:

Q. Professor Freeman, do you know if your ethics opinions were ever passed on to Greitzer and Locks directly or indirectly?

[Tr. 132] A. I believe that they were.

Q. How do you know that?

A. Because my memorandum to Ron Motley, dated September 1, which is Objectors' 34, refers to seeking an expressed agreement with prospective co-counsel as to my recommendations. And in fact, those — this recommendation as to the ethical propriety and so forth was embraced in the document. And so I have — almost verbatim as to Item 2. And so I have to believe that since Mr. Locks and your firm signed off on the agreement, that they were aware of my advice.

THE COURT: The agreement is SP-300, the stipulation of settlement?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

BY MR. MILLER:

Q. Professor Freeman, I'm going to draw your attention now to four letters concerning the Greitzer and Locks present inventories that are part of SP-302C and were previously moved into evidence. And the letters are the following:

The first is a letter of August 3rd, 1992 from Gene Locks to Kevin Gears (ph). Bates 530.

The second is a letter of October 26, 1992 from Balefsky, B-A-L-E-F-S-K-Y to Gears, Bates 545 and 546.

The third is a letter of December 10, 1992 from [Tr. 133] Locks to Gears, Bates 539 and 540.

And the last one is a letter of July 9, 1993 from Locks to Rooney, Bates 542 and 543.

Have you reviewed those four letters?

A. Yes.

Q. Do you have an opinion to a reasonable degree of professional certainty whether or not Greitzer and Locks entered into an unethical lock-out with CCR?

A. In light of the facts that I discussed previously, and in adding on this July 9th letter, signed by Gene Locks, clar [sic] — which states to clarify what we always agreed to and what was always our understanding, I do have an opinion.

Q. And what is that opinion?

A. That Greitzer and Locks did not intend to or it did not enter into an unethical lock-out agreement with CCR.

MR. BARON: Your Honor, I object and move to strike, because I think he's testified that his opinion is based in part upon the other items, including his conversations with lawyers from Greitzer and Locks. And unless that's straightened out —

MR. MILLER: Your Honor, he do not so testify, and I'm certainly willing to ask him in a little more detail what he based it on and then your Honor can have the full record.

THE COURT: He has not testified to any conversations with Greitzer and Locks. All the conversations [Tr. 134] were with the Ness, Motley —

MR. BARON: No, your Honor.

THE COURT: — firm.

MR. BARON: I believe previously he testified that he has visited with the lawyers from Greitzer and Locks and talked to them about this particular agreement.

THE COURT: He may have, but he didn't say he relied on it.

MR. BARON: I thought he just said that. I'm sorry. That he relied on all of the information he previously described.

MR. MILLER: If I may explain your Honor or ask the question?

THE COURT: Well, let's withdraw the question —

MR. MILLER: Thank you.

THE COURT: — and if you want to lay a little more foundation, and try it again, we'll see.

MR. MILLER: Okay.

BY MR. MILLER:

Q. Professor Freeman, would you please explain in a little more detail, but in summary fashion, the different items on which you relied for your opinion?

A. Well, first there is in the record the June 9, 1993 —

Q. You mean July 9?

A. Pardon me?

[Tr. 135] Q. July 9 I think you mean?

A. I'm sorry, July 9th, 1993 letter from Gene Locks to Mike Rooney, which I believe is also in the Objectors' Exhibit book.

And it states that "To clarify what we always agreed to, and what was always our understanding, we stated that our firm would use its best efforts to encourage, and would recommend that our future clients defer litigation against the CCR defendants until that claimant's medical condition satisfied the mutually acceptable medical criteria set forth in Carlough."

And it talked about, you know, we will make this recommendation in exchange for a totaling of the statute of limitation, and it goes on to say, "Unless in the exercise of our independent professional judgment, given some unforeseen circumstances, we conclude other for a particular client", and that's in evidence, and that is a major item that goes to the issue of the party's intent and the understanding of their prior agreements.

Now, I had testified previously that Mr. Fitzpatrick, when he was asked what kind of commitment, was talking about a recommendation. That's what his testimony was. It was in the record and I believe it was in the record on his direct on the first day of this hearing.

I also go back to what Mr. Rooney said about the [Tr. 136] parties not being intent or seeking to engage in any unethical behavior.

I also go back to what I said about what just leaps out of the stipulation to me, with the parties time and again referring to their desire that the Court conduct an inquiry into and find that their behavior is ethical.

And also, the provision on Page 97 of Exhibit 300, which leaves counsel free at all times to do whatever it needs to do in order to engage in ethical behavior.

I also take comfort, as I said before, in Judge MacQueen's evaluation of this. I take comfort in the evaluation of it by other professionals like me, including Professor Hazard, who is the dean of — in my judgment, the dean of Professional Responsibility Teachers In America.

Q. Are all these materials that you have just mentioned, materials of the type on which an expert in your field would customarily rely?

A. Absolutely.

Q. Based upon the materials you have just told us, what is your opinion regarding whether or not Greitzer and Locks entered into an unethical lock-out with CCR?

A. No unethical lock-out.

Q. Okay. And the reasons for that, if there are any, in addition to —

A. I rely on my prior —

* * * *

TESTIMONY OF CHRISTINE OLIVER

* * * *

[Tr. 96] Q. Dr. Oliver, define the term fibrosis for us, if you would, please?

THE COURT: As it applies to lung disease?

MR. BARON: As it applies to lung disease, right.

THE COURT: Thank you.

THE WITNESS: Fibrosis is a term that is synonymous with scarring. It is scarring.

MR. BARON: Might I stand here for just a moment, your Honor?

THE COURT: Sure.

BY MR. BARON:

Q. Dr. Oliver, in the diseases caused, the-non-malignant diseases caused by asbestos exposure, what causes the scarring or the fibrosis that you've just described?

A. It's not entirely certain, but it has to do with the interaction between the asbestos fiber and the tissue. This tissue may be either pleural tissue, or it may be parenchymal tissue.

And it's likely that the fiber causes an inflammatory response, which then recruits certain cells of the body, and the fibrosis or scarring occurs as a result of enzymes [Tr. 97] and mediate — or in all likelihood is related to the release of enzymes and mediators by these cells that react to the presence of the fiber.

Q. Okay. In the disease asbestosis, where do you most often see this fibrosis or scarring?

A. Most commonly looking at populations of exposed individuals, you see it in the pleura.

THE COURT: That's the so-called parenchymal disease?

MR. BARON: No.

THE COURT: Or not?

BY MR. BARON:

Q. Let's define the difference between the pleura and the parenchyma? I don't know how to spell parenchyma.

A. P-A-R-E-N-C-H-Y-M-A.

Q. All right. We've heard those two terms bandied about here, let's see if we can't get a good definition.

What is the pleura?

A. The pleura is the lining around the lung in simplest terms. It consists of mesothelial cells, and there are two types of pleura in the body. One is the visceral pleura, which is very tightly adherent to the lung parenchyma or the lung tissue.

The other is the parietal pleura, which lines the rib cage.

[Tr. 98] Q. From time to time, physicians might refer to the pleura as a sac. Is that an appropriate description, around the lung or not?

A. It's not one I would use.

Q. It's a lining of the lung?

A. Yes.

Q. Okay.

THE COURT: Outside lining, would that be fair?

THE WITNESS: Yes.

BY MR. BARON:

Q. Outside lining.

A. Yes. I mean you can think about it in some senses as like the peel of a grape.

Q. Ah, peel of the grape.

We are searching desperately for layman's terms in this case, Dr. Oliver, I can assure you. Now —

THE COURT: We'll use all of them.

MR. BARON: We'll use them all.

THE COURT: Whatever we can get.

BY MR. BARON:

Q. Lining of the — what did you say, the peel of the grape?

A. Yes.

Q. Okay. And what is the parenchyma?

A. The parenchyma is the lung tissue itself. It's the — well, it's the lung tissue itself. It's made up of [Tr. 99] intersticial [sic] tissue and the alveoli, which are the functional — the primary functional unit of the lung.

Q. Okay. And that would be the interior surfaces, is that a good way to put it?

A. Well, not — I wouldn't call it interior surfaces, although each alveolus has a surface around it, and there are hundreds of thousands of alveoli. It's the lung tissue —

Q. Okay.

A. — as opposed to the lining around the lung.

(Pause in proceedings.)

Q. And that would be grape —

A. Yes.

Q. — other than i' , peel?

A. Yes.

Q. Okay.

THE COURT: Just to get me back up-to-date before we started the definitions, Dr. Oliver, you said asbestosis fibrosis or scarring —

MR. BARON: That's what I'm getting right into.

THE COURT: — is seen most frequently where?

THE WITNESS: In the pleura.

MR. BARON: That's exactly what I was going to get into, your Honor.

THE COURT: I think she said that, and I wanted to —

[Tr. 100] MR. BARON: Okay.

THE COURT: — I note — that's where I got my terms backwards.

BY MR. BARON:

Q. Now, you said the most common place where you find this fibrosis or scarring is in the pleura in an asbestos case, is that correct?

A. Yes.

Q. All right. Now, how do you describe the different types of scarring that occur on the pleura?

A. The different types of scarring that occur on the pleura basically fall into two categories. One is the category of diffuse pleural thickening. The other is the category of pleural plaques.

Pleural plaques are areas, discrete areas of pleural thickening. The pleural plaques involve primarily the parietal pleura.

THE COURT: Could you tell us what parietal means, that definition?

BY MR. BARON:

Q. Parietal is which of the two pleuras?

A. Parietal is the pleura that lines the rib cage. And these two types of — these two pleural surfaces are separated by very small space, which is fluid filled so that they slide against each other.

[Tr. 101] Q. Okay. Now, how can a physician tell the difference between diffuse scarring of the pleura, and discrete scarring of the pleura, which are plaques?

A. Physicians can tell the difference primarily in one of two ways. The first is pathologically, that is if you have the opportunity to open up the chest and look and see what's in there, then you can tell whether — you can distinguish a parietal pleural plaque from diffuse pleural thickening.

Secondly, the chest x-ray allows distinction between pleural plaques and diffuse pleural thickening. It's often however difficult to make that distinction on chest x-ray, and in order to facilitate that distinction, the ILO system of classification has provided that in order to diagnose diffuse pleural thickening, what is required is blunting of or more of the costophrenic angles on chest x-ray.

Q. What is a costophrenic angle? That's a good one.

A. A costophrenic angle is like a trough. It's where the lung — the hemidiaphragm and the lateral rib cage meet.

Q. Okay. And when you say blunting, what does that mean?

A. Well, normally the costophrenic angle is sharp, and when there is blunting, it's not sharp.

Q. Well, why would it not be sharp?

A. There's like a meniscus that you can see in the costophrenic angle, and it cannot be sharp because there is scarring there, it can be blunted if there is fluid there.

[Tr. 102] Those are the two major causes of blunting. It can sometimes be blunted if the hemidiaphragm is pushed up from below for some reason.

Q. Okay.

A. But the major causes are scarring and fluid.

Q. Okay. Would that scarring he [sic] scarring in the parenchyma or scarring in the pleura?

A. The pleura.

Q. Okay. So blunting of costophrenic angle then results from scarring or fibrosis of the pleura?

A. It can result from that, yes.

Q. Does that scarring have to be diffuse, or could it also be discrete, which is what we've been calling plaques?

A. Well, in general, if blunting of the costophrenic angle is seen, it's considered to be diffuse pleural thickening and scarring that is responsible for the blunting.

On postmortem exam or at surgery, it might be possible at times to find that in fact it was a discrete plaque, but for the most part it's considered to be diffuse pleural thickening.

Q. All right. Another thing we need to get straight here, we're using two terms for pleural changes, diffuse and discrete. And the discrete one is also known as plaques, is that correct?

A. Yes.

[Tr. 103] Q. Now, when you say diffuse, what does that refer to?

A. That refers to a another type of pleural scarring. And it's exactly as it says, and that is diffuse pleural thickening tends to be diffuse as opposed to circumscribed. That is, it tends to continue longitudinally the lateral chest wall.

Q. Okay. And discrete or plaques, as we've referred to them, how do they appear?

A. They tend to be discrete or localized, and if you look at pleural scarring on chest x-ray, one way to think about it is the diffuse pleural thickening does tend to be more continuous. Whereas the discrete pleural scarring or pleural plaque has more of a lumpy bumpy appearance.

Q. Okay.

A. That's not always true, but in general that's a useful way to think of the difference.

Q. Okay. Now, Dr. Oliver, can you explain to us why it is that asbestos causes this fibrosis or scarring of the pleura?

A. Well, with regard to pleural plaques it's not entirely clear. What we do know is that these asbestos fibers probably migrate through the lungs, out into the pleural space. And once in the pleural space set up an inflammatory response of some sort that causes fibrosis or scarring.

Often what precedes the diffuse pleural thickening is actually a pleural reaction that involves fluid as well.

[Tr. 104] So that we know in at least in some cases of diffuse pleural thickening, there is a pleuritis, there is definitely an inflammatory response.

Q. Okay. When you say an inflammatory response, what does that really mean to us lay people?

A. Well, that means is that certain types of white blood cells are recruited to the area. And as I said earlier, this type of recruitment of cells and the release of mediators and enzymes by these cells, probably has to do not only with the fibrosis that we spoke about earlier, but also is what causes the inflammation, the inflammatory response.

It's like what happens if you step on a nail. White blood cells are recruited to the area and these white blood cells then start to

release certain substances which result in the redness that surrounds the area where you stepped on the nail.

Q. Does the inflammatory process come before the actual formation of the plaque or the discrete thickening?

A. Yes.

Q. Okay. And so would it be fair to say that the plaque is the end result of the inflammatory process?

A. Yes.

Q. And when the thickening is diffuse, what does that tell you about the inflammatory process that's been going on in the lung surfaces or the pleural surfaces?

[Tr. 105] A. Well, it — I don't know how to exactly answer that any better than I have already answered it. That is —

THE COURT: Dr. Baron speaking. Dr. Baron says there is a —

MR. BARON: No, Dr. Baron —

THE COURT: — connection?

MR. BARON: Well, no.

BY MR. BARON:

Q. Does that indicate that the reaction is more widespread?

A. Perhaps.

Q. Okay.

MR. MOTLEY: I think —

MR. BARON: Where is the towel, I'm ready to throw it in.

THE COURT: Dr. Baron was reversed by a superior.

MR. BARON: Okay.

BY MR. BARON:

Q. Dr. Oliver, in order for the asbestos fibers to reach the pleura, where do they have to go through?

A. The lung tissue.

Q. Okay. And when they pass through the lung tissue, do you have an opinion as to whether or not damage is created to the lung-tissue?

A. I think in all likelihood there is some damage in most cases, yes.

[Tr. 106] Q. Okay. Now, Dr. Oliver, have you had the opportunity to research the effects of this pleural scarring that is both diffuse or discrete, it is either diffuse or discrete on humans?

A. I've done research in the area of pleural plaques.

Q. Okay.

A. I have not looked at diffuse pleural thickening.

Q. Okay. In the area of pleural plaques, have you been able to form an opinion based on reasonable medical certainty as to whether people with pleural plaques develop a functional response in terms of their inability to do the things they used to be able to do?

A. In my opinion, yes, that does happen.

Q. Okay. And can you describe to his Honor the nature of the studies that you've done on that issue?

A. The studies that we have done have been looking at relationships statistically between the occurrence of pleural plaques and exposed groups and lung function. We've had the opportunity to do this both in railroad workers that examined cross-sectionally and also in a group of Boston public school custodians whom we've had the opportunity to follow since 1987.

With the — with regard to the study of railroad workers, we defined pleural outcome — pleural abnormalities,

* * * *

[Tr. 157] oncologist, is unnecessarily and for some individual unreasonably restrictive.

Internist can diagnosis lung cancer. Occupational physicians can diagnose lung cancer, surgeons can diagnose lung cancer.

Q. Okay. Do you have any problems with Subsection B, the exposure requirement or the latency requirement of 12 years?

A. The wording here is a little confusing to me. It says, "Exposure sufficient to meet the minimum requirements, occurring at least 12 years. I don't know if this means 12 years of latency. I don't know if this means that in 12 years of exposure occurred, and ended 12 years prior to diagnosis of the tumor, and they're different.

Assuming that — this means latency, I would say as I testified earlier, I think a latency of 12 years itself is not unreasonable. But there will be individuals who will fall outside of that 12-year latency, depending on the level of their exposure.

There are studies that have been done that have shown latencies as short as five years in individuals with high levels of exposure.

Q. Okay. Now, after going through the two sections there, A and B, have you read Subsection C, which are the medical criteria?

A. Yes.

[Tr. 158] Q. Okay. Doctor, do you have an opinion based on reasonable medical probability as to whether the medical criteria set out in the settlement stipulation will unreason — will exclude people with asbestos related lung cancer?

A. My opinion is that they will.

Q. And Doctor, do you have an opinion on how many such individuals might be excluded or will be excluded under these requirements?

A. Well, I testified — as I testified at my deposition, in my opinion, based on my direct experience with individuals who have had asbestos exposure, and lung cancer, requiring in addition either radiographic or physiologic evidence of asbestosis would result in excluding approximately 50 percent. I would say 45 to 50 percent of individuals that I have seen with lung cancer that I believe is causally related to asbestos exposure.

Q. And why would such individuals be excluded?

A. Because they do not have radiographic or physiologic — actually it's radiographic and physiologic abnormalities of the types set forth in this document.

Q. Doctor, do you believe that there is a sound scientific basis for the criteria that are set out under the lung cancer standard?

A. In my opinion, requiring that asbestosis be a co-partner of lung cancer is unreasonable.

* * * *

[Tr. 168] Q. Do you agree that the asbestos fibers when you inhale them, they're deposited into the lung and they start causing a mechanical injury to the cells and to the adjoining tissue upon that retention by the lung?

A. Yes.

Q. In other words, the injury itself starts in a matter of hours after the inhalation and retention of the asbestos fibers?

A. There is evidence to show that there are — there is a response particularly in the mucosa of the airways shortly after asbestos fibers are inhaled in animal models.

Q. So it may be a significant amount of time — we're talking about years before one would manifest an asbestos-related injury after exposure but the injury itself at a cellular level starts upon the retention of the fiber in a short period of time?

A. Well, I think it would be fair to say an injury manifested itself. I think it's unlikely that there is the injury, implying that there is one injury. I think it's probably a series of events.

Q. Okay. And whatever the injury, it has to develop for a number of years before it becomes manifest by the diagnostic tools that we have available including chest x-ray and pulmonary function tests?

A. Yes.

* * * *

[Tr. 210] (Pause in proceedings.)

MR. HOUFF: May I proceed, your Honor?

THE COURT: Mr. Houff, yes, sir.

MR. HOUFF: Thank you.

CROSS-EXAMINATION

BY MR. HOUFF:

Q. Doctor, good afternoon.

A. Good afternoon.

Q. Unlike Mr. Rice, you and I have never met before except just before you testified and at your deposition in this case, correct?

A. I believe so, yes.

Q. Okay. And we have not had dinner together?

A. No.

Q. Okay. Doctor, you are not board certified in pulmonary medicine, correct?

A. That's correct.

Q. Now, you have said that your definition of asbestosis includes a person who only manifests pleural changes, correct?

A. Yes.

Q. Now, in saying that, you are in substantial disagreement with a large and well respected authoritative body of medical literature which says that is not asbestosis, isn't that [Tr. 211] correct?

A. There are articles in the literature that indicate disagreement with that position — with my position.

Q. Well, do you agree that you are in substantial disagreement with a large and well respected authoritative body of medical literature which says that that is not asbestosis?

A. I would have to disagree with that statement as you made it, yes.

Q. Okay. Do you remember testifying in 1985 in the Santa Maria case?

A. Yes, I do.

Q. Do you recall that Mr. Cetrullo who was cross-examining you at that time, do you remember that?

A. I recall that he was cross-examining me, yes.

Q. Okay. And I'll be happy to show you —

THE COURT: Would you spell his last name for the record, please?

MR. HOUFF: C-E-T-R-U-L-O, your Honor. One L.

UNIDENTIFIED SPEAKER: Two L's.

MR. HOUFF: Okay. I won't quibble over an L.

THE COURT: What's the first letter in his word?

MR. HOUFF: It's C —

THE COURT: C.

MR. HOUFF: C as in Charles. Cetrullo.

[Tr. 212] THE COURT: Okay.

BY MR. HOUFF:

Q. I'll be happy to show you the excerpt from the transcript after I read it, but Mr. Cetrullo asked you on Page 4-151.

MR. BARON: I'm sorry, do you have a copy of the transcript?

MR. HOUFF: I have — yes.

(Pause in proceedings.)

BY MR. HOUFF:

Q. And it's beginning at Line 5. Mr. Cetrullo said, "In a sense you would say that person has asbestosis. You are in substantial disagreement with a large and well respected authoritative body of medical literature which says that is not asbestosis, do you agree with me?

"Answer: I would say that is correct."

Would you like to see it? I'll be glad —

A. Yes.

Q. Okay.

MR. HOUFF: May I approach, your Honor?

THE COURT: Sure.

(Pause in proceedings.)

THE COURT: Just stand back, Mr. Houff, and let the doctor reflect on the material, please.

MR. HOUFF: Certainly.

THE WITNESS: You've read it correctly.

[Tr. 213] MR. HOUFF: Thank you.

(Pause in proceedings.)

BY MR. HOUFF:

Q. Doctor, are you also familiar with the American Thoracic Society official statement, which appeared in 1986 regarding the diagnosis of non-malignant diseases related to asbestos?

A. Yes, I am.

Q. Okay. And that document indicates that the term asbestosis should be reserved for the interstitial fibrosis of the pulmonary parenchyma in which asbestos bodies or fibers may be demonstrated, correct?

A. That was their view, yes.

Q. Yes. And you disagree with that?

A. Yes, I do.

Q. Okay.

(Pause in proceedings.)

Q. Doctor, just to — and I don't want to belabor this point.

MR. HOUFF: Your Honor, may I approach the chart and question the doctor there briefly?

THE COURT: About the stuff that's written there?

MR. HOUFF: Well, no, I just want to flip it over and go into something a little different.

THE COURT: If you think it's important.

MR. HOUFF: Yes, sir.

* * * *

TESTIMONY OF ROBERT WAGES

* * * *

[Tr. 209] filed claims. I presume they did that because they felt that they were responsible.

Q. When you say numerous claims, do you have any better estimate than that?

A. Hundreds, I believe is accurate.

Q. Now, has the — I will get into this in more detail, but I — just to ask basically.

Has the OCAW taken a formal position regarding the fairness of the settlement before the Court here?

A. This settlement?

Q. Yes.

A. We've taken the position that it's not fair.

Q. And when did you formally take that position?

A. Sometime in January.

Q. Of this year?

A. January of this year, yes.

Q. Now, how did you first find out about this case, and by that I mean, the case originally known as Karlough and now known as Georgine?

A. A press release issued by Lane Kirkland.

Q. And approximately when was that?

A. Some time in October.

THE COURT: Spell the gentleman's last name for the record.

THE WITNESS: I'm sorry.

* * * *

[Tr. 230] A. Fairly regularly.

Q. Which papers do you read, sir?

A. Well, outside of the hometown paper which is the Denver Post I read as often as I'm in the office the New York Times, the Washington Post and the Wall Street Journal.

Q. Now, have you read the actual individual notification package approved by the Court in this matter?

A. Yes, I received a notice packet from someone in December.

Q. Of 1993?

A. Of 1993, yeah.

Q. Now, turning, I just want to ask a series of questions about notice, and in the papers that OCAW filed with the Court in January, OCAW expressed concern with notification. Now, why is it as a president of the OCAW you have some concerns about the notification in this matter?

A. Well, generally I have three basic concerns. One is that I don't believe it is humanly possible to give adequate notice to people who have gone through my union who have belonged to my union who were impacted by layoffs because we had a massive number of layoffs in the late '70s and early '80s with refinery closures. We don't maintain records of them. We don't maintain records of retirees on any systematic basis. We have no idea where people go after they pass through the union. I viewed trying to notify everybody potentially exposed as an absolute impossibility.

[Tr. 231] Q. Well, you're talking about layoffs. You mentioned the beginning. What is your current membership?

A. Current membership is about 100,000.

Q. And prior to these layoffs that you mentioned in answer to the previous question, what was the high point of your membership?

A. Well, at about 1977, thereabouts, it was about 180,000. I think our peak membership was about 185,000. May have been higher, but it was before my time.

Q. And do you have an estimate as to about how many OCAW retirees there are?

A. Well, retirees, retirees per se, no. Retirees and people laid off who've passed through, yeah, about 200,000.

Q. And why is it that you don't have records of the retirees and the layoffs?

A. The reason is we don't have the kind of system where we are the joint administer over a pension plan or a joint administer over

a welfare plan where everybody passes through you have some connection to. The union has a connection to the individual. In the industrial work setting, that just doesn't happen, it's not the real world. Employers pay the pension, employers carry the welfare plans. Unions on the industrial side for the most part don't. There are some that do, but for the most part, particularly with us, we don't.

* * * *

[Tr. 233] just a matter of fairness, I think that's wrong. I don't think you can expect people to intelligently make a decision today about circumstances that are going to perhaps bar them from an election somewhere down the road on circumstances that may exist down the road.

Q. What circumstances are you referring to?

A. Well, if they, you know, you've got a choice here in this settlement to be a member of the class or opt out. And those are — that decision is going to be governed by whatever your present day circumstances are. And I think it's very difficult when you're not injured, when you don't know if you're going to get injured what your circumstances are going to be, you know, 10 or 15 years down the road with respect to what your decision would be then, if in fact you become injured. It makes sense to me. I'm not sure it makes sense to you.

Q. Did the OCAW provide notification to its current members?

A. No.

Q. And why not?

A. I should qualify that by saying not in any formal sense.

A. number of our local unions did provide some notice. The reason the international didn't is that by the time we concluded officially, and that was after consultation with my international officers in early January, there was no way to [Tr. 234] notify them to get it done by the cutoff date.

Q. And you said that some of the locals provided some notification.

Do you know what — to your knowledge what that entailed?

A. Some of our locals here in Philadelphia for instance, we represent the folks down in the refineries, a couple of our locals, hand builder folks to the extent they had a retiree club. They tried to notify their retirees.

I think our local in Texas, our Port Arthur local took an ad out in the paper and published a letter signed by me, so that they could get all of the folks in the Jefferson County area to — it was a request to opt-out.

Q. In terms of the settlement itself now, Mr. Wages, have you reviewed the stipulation of settlement?

A. Yes.

Q. And have you formed views about some of the particular provisions of the stipulation?

A. I have.

Q. Let's go through them if we can.

Do you have any views as to the amounts of compensation available under the settlement?

A. We've concluded that the compensation amounts appear to be lower than what our people are experiencing in the tort system in settlements, including settlements of CCR.

* * * *

CROSS EXAMINATION

[Tr. 244] could be a significant issue in that case, especially in a mesothelioma case?

A. I could imagine someone could try to use that as an issue, yes.

Q. All right. Now, you also made — are you aware that under the stipulation of settlement that any issue about the chrysotile being a less dangerous has been waged by the CCR members who make the chrysotile fiber?

A. Absolutely. That's my understanding, yes.

Q. Okay.

MR. RICE: Your Honor, may I approach the witness and give him a copy of the compensation schedule (Inaudible)?

THE COURT: Is that Schedule B —

MR. RICE: Schedule B.

THE COURT: — Settling Parties' Exhibit 300.

MR. RICE: Yes, sir.

BY MR. RICE:

Q. Mr. Wages, I just want to make sure I understand what you were saying about the settlement values.

What is the source of your knowledge of the settlement values that OCAW members have gotten in settlements?

A. The ultimate source?

Q. The ultimate source?

A. The ultimate source is you.

[Tr. 245] Q. Thank you. Now, we're going to go into that in a few minutes.

Would you agree with me from the information that I provided to you, that in 100 — or almost 100 percent of the cases that your members have been paid within the minimum and maximum range listed in the ordinary compensation schedule there?

A. The minimum and maximum value range here?

Q. Yes.

A. Yes.

MR. BARON: Your Honor, I object unless he defines what types of claims, for what types of injuries and for what minimum or maximum range. This is too broad a question.

MR. WOLFMAN: I'll respond —

THE COURT: Well, the witness answered it and he's pretty knowledgeable. Objection's overruled.

Someone else can ask him that if they want to later. Maybe Mr. Wolfman.

BY MR. RICE:

Q. When you were discussing with Mr. Wolfman that your settlement history numbers may not be within the range, you're referring to what's labeled as the negotiated average value range?

A. That's what I thought I testified to.

[Tr. 246] Q. Okay.

(Pause in proceedings.)

Q. Now, you are aware from your experience in the asbestos litigation that in some jurisdictions cases get compensated at a greater value than in other jurisdictions?

A. Yes, sir.

Q. And you've told us that your membership works in the oil and chemical refineries and a lot of your members do that, right?

A. That's right. That's where part of them work.

Q. Right. And you're aware that in Texas the averages may be a little higher than they may be, let's say, in Philadelphia or in Boston?

A. Yes. Those variables exist.

Q. And they exist in the tort system?

A. Yes, they do.

Q. Now, dealing with the back-end opt-outs you talked to Mr. Wolfman about —

A. Yes.

Q. — you stated that you didn't believe that was much of an option. Do you know from any information what percentage of the historical cases have actually been tried with CCR?

A. Of all the cases —

Q. Of all the cases.

A. — that are filed?

* * * *

[Tr. 263] MR. ALDOCK: I show you what's been marked as SP-305, your Honor. This is a letter that's before your Honor in a yellow folder. It's been given to the objectors, and I'd like to give it to counsel. It's from Lane Kirkland and it's a Dear President letter dated October 29, 1993 with respect to notice that I believe went to this gentleman and all other presidents.

THE COURT: You may.

BY MR. ALDOCK:

Q. Have you seen that letter before, Mr. Wages?

A. I believe I have, yes, sir.

Q. You received it around on or about October 29th or shortly thereafter?

A. Yeah, in that time frame I'm sure.

Q. And it seeks your cooperation with regard to sending out notice with regard to the class action?

A. Correct.

Q. And it says that the labor movement in Lane Kirkland's view would provide an important service to union members by facilitating the circulation of the notice?

A. That's true, that's what the letter says.

Q. If that endorses the settlement in the second paragraph?

A. Yes.

Q. And the last paragraph says that this notice could be [Tr. 264] provided to union members and retirees for union publications or direct mail. If direct mail is used, the notice materials would either be mailed by the union or sent to a mailing house. All this would be confidential. The settling parties would pay all costs associated with this notice effort.

A. Yes, that's what it says.

Q. So you got that in October. Did you then subsequently get a letter directed to you personally with regard to the notice?

MR. ALDOCK: I'd like to show your Honor what's been marked as SP-306 in your Honor's yellow folder, distributed to objectors, a letter to Mr. Wages that doesn't appear to have a direct date on it.

BY MR. ALDOCK:

Q. Do you recall seeing that before, sir?

A. No, I don't.

Q. Do you believe that you didn't get it?

A. Do I believe I didn't get it?

Q. It's a letter addressed to you from the Court.

A. It may not have gotten to me because it has a Denver address. Our office isn't in Denver, it's in Lakewood. They quit forwarding about a year ago.

Q. Are you aware of numerous calls to your secretary on November 12th, and on November 17th with respect to that letter?

[Tr. 265] A. Calls to my secretary —

Q. Your secretary is named Ruthanne, isn't it?

A. Right.

Q. Does she get calls with respect to your response to that letter?

A. She may have.

Q. Did she tell you about it?

A. I don't recall whether she told me about it or my executive assistant, Dean Alexander, told me about it.

Q. So you're aware —

A. But I was aware that there were some phone calls made from the District Court, and that Ruthanne may well have cleared up the snafu over the address in that discussion, I don't know.

Q. And you're aware that someone was sent — was told to talk to your general counsel, Mr. Mooney, with respect to that notice and Mr. Mooney was sent a notice package for you?

A. Yes, since I did get a notice package, yeah.

Q. And it was mailed to Mr. Mooney on or about November 17th?

A. I don't know that.

Q. Is Mr. Mooney's address 255 Union Boulevard, Lakewood, Colorado?

A. Yes.

Q. I show you a mailing label to Mr. Mooney marked as SP-[Tr. 266] 309. Would that refresh your recollection of whether you believed Mr. Mooney would have gotten that?

A. With all due respect, sir, it doesn't refresh my recollection about anything.

Q. Is that the correct address for Mr. Mooney?

A. Yeah.

Q. That's a mailing label to him?

A. It appears to be.

Q. And you eventually got a notice?

A. I eventually got a notice.

Q. And if that label was dated the 17th, do you have reason to believe that was likely the way you got it and on the date on which you got it?

A. I suspect that that's a good deduction.

Q. And having gotten the letter which offered to provide copies of the notice in as many copies as you wanted to any list that you provided in any confidential way you want at the full expense of the settling parties, you elected not to send any copy to any of your members; is that correct?

A. Yes, that's right.

Q. Are you aware that 40 other unions elect — including the carpenters and including the paper workers — all sent notices in publications and otherwise some by direct mail, some in publications, to millions of members in total?

MR. BARON: Your Honor, I object. There's no [Tr. 267] predicate in the record for that. If he asks it as a hypothetical —

THE COURT: Mr. Aldock, can you respond —

MR. ALDOCK: It is in the record, your Honor.

THE COURT: Where is it?

MR. ALDOCK: It's in reports that have been filed with this Court, and Mr. Baron has a copy and it's — I'll have it marked as SP-310, Settling Parties Final Report On Implementation of Notice.

MR. BARON: Your Honor, the report is not subject to cross-examination, and it's not in the record in this particular hearing.

MR. ALDOCK: Miss Consella's (ph) deposition was taken with respect to this document.

THE COURT: I'm not sure it's admissible in evidence then. No one has convinced me that it is; therefore I'd like to proceed

cautiously. The mere fact you file something in court doesn't mean that it's admissible in evidence.

MR. ALDOCK: I would go further, your Honor, and say that it was the subject of a deposition of Miss Consella taken in this case by Mr. Baron.

MR. BARON: That's right, that's correct. Still that doesn't make it anything that is —

THE COURT: You expect that there's going to be evidence in the record of the materials set forth in Settling [Tr. 268] Parties 310 other than through this document?

MR. ALDOCK: They have offered the designations of Miss Consella at that deposition including matters that pertain to this document, your Honor, for your Honor's perusal. I believe also that this witness will not disagree with the contents of which I am asking him to identify.

MR. BARON: Your Honor, I cross-examined the witness and I think she disagreed with some of the numbers here. I certainly think there was a real question as to whether some of these things went out. I don't believe this record itself is independent proof that what it says in the record is true. So if he wants to ask it as a hypothetical, I have no objection, but he's asking it as if it was true.

MR. ALDOCK: I'm asking this witness if he is aware, your Honor, and I think he is.

THE COURT: Well, all right, you can start out with whether he is aware of this document, ever seen it before or any of the information in it.

BY MR. ALDOCK:

Q. Are you aware not of the document, Mr. Wages, but the fact that these unions, many of them, did exactly what you chose not to do which is to send the notice to their members?

A. I am aware that unions did it. I'm not aware of any of the specifics here.

Q. Are you aware that the carpenters did it?

[Tr. 269] MR. BARON: Objection unless he says what specifically.

BY MR. ALDOCK:

Q. Are you aware that the carpenters sent notice to their members of the court-approved notice in this case?

A. I don't know that.

Q. Do you have a list of the current members of your union?

A. Current membership list?

Q. Right.

A. Yes.

Q. Could you have given that to the settling parties for mailing or could you have mailed to that list, if you chose to?

A. I doubt it. We have a constitutional prohibition against giving out our membership list.

Q. Could you have mailed to that list at someone else's expense if you chose to do so?

A. Could I have?

Q. Yes.

A. The union, yes.

Q. Do you have a list of the people that have been screened for asbestos-related disease by your union?

A. Yes, we do.

Q. Is that in the thousands of people?

A. Yes, I believe thousands would be accurate.

[Tr. 270] Q. You think it would have been useful for those people to receive a copy of this notice so that they could make their own choice with regard to this matter?

A. Well, I determined that I wasn't going to do it and I didn't do it.

Q. Mr. Wages, as a reader of newspapers, were you in the United States in the first week and second week and the third week of December?

A. The second week and third week. Not the first week.

Q. Did you —

A. I was in Europe.

Q. Did you happen to see either the New York Times or the Washington Post's full-page ad on December 19th?

A. On December 19th? No, I was skiing in Steamboat Springs.

Q. Did you see the Denver Post full-page ad in the Parade Magazine on December 19th at Steamboat Springs?

A. Not on the 19th. I didn't read a paper that day.

Q. Mr. Wages, are you aware that no member of the CCR has been held liable and paid a punitive damage award in the history of the CCR?

A. No.

MR. ALDOCK: No further questions, your Honor.

TESTIMONY OF ROBERT HATTEN

* * * *

[Tr. 26] Q. And have you been at a lot of meetings where plaintiffs attorneys — where the asbestos litigation was discussion on a national scope?

A. Yes. It would be discussed in the bankruptcy committee meetings. It would be discussed in the ALG meetings that Ron motley would have. It would be discussed in co-counsel meetings that Ron Motley would call.

From time-to-time there were special meetings. The plaintiffs bar met regularly and discussed these matters regularly.

Q. Throughout your 20 years or so in the asbestos litigation, have you become very familiar with the law firm of Ness, Motley?

A. Yes, I have.

Q. Would you tell us in your view what law firm or law firms have been the most active firms in litigating the liability of asbestos manufacturers from the beginning to the current time?

MR. BARON: Your Honor, I object on foundation.

THE COURT: Overruled.

THE WITNESS: The most active litigating firm in the national has been the Ness, Motley firm. They have co-counsel relationships to my knowledge in virtually every state in the Union. And so I would say that there really isn't a close second in terms of the most litigious group in [Tr. 27] the nation.

BY MR. RICE:

Q. What about the firm that represents the most individual victims in the country?

A. Again it would be the Ness, Motley firm.

Q. You told us earlier what the asbestos litigation group was. Has that group continued to function continuously since the early 1970s, to your knowledge?

A. Yes, it has.

Q. And has that group from-to-time called meetings to discuss national issues and to present various problems on liability or the issues in asbestos?

A. Yes.

Q. In the early 1970s when that group was started, do you know who was selected as chairman of the group?

A. Ron Motley.

Q. Since at least 1978, has anyone to your knowledge ever served as chairman of the asbestos litigation group other than Ron Motley?

A. No.

Q. Now, you've told us about the involvement of Greitzer and Locks, you've told us about Ness, Motley.

Were there in fact other law firms that have made significant contributions to the asbestos litigation?

A. Yes. From the very beginning, Tom Henderson has made

* * * *

[Tr. 88] MR. HENDERSON: Objection, your Honor.

THE COURT: Sustained.

BY MR. RICE:

Q. What was the reaction — what did the bar do? What were the plaintiffs doing in exchange for that concern, or in response to that concern?

MR. BARON: Objection, foundation.

THE COURT: Sustained.

BY MR. RICE:

Q. What were you and Mr. Glasser and your other co-counsel doing in response to that concern?

A. That did not concern us.

Q. Why did it not concern you?

A. It did not concern because since the mid-1980s, we had not filed pleural cases or tried very hard not to, and this was an issue that was an issue to other plaintiffs counsel. It was not an issue to us.

Q. All right. Mr. Hatten, I want to turn with you to the Georgine negotiations.

When did you first learn that some people were trying to negotiate a resolution with the CCR to the asbestos crisis?

A. Well, in the summer of 1992 is when I first learned that Gene Locks was negotiating with the CCR relative to some potential global resolution.

[Tr. 89] Q. Tell us how you found — you discovered that, and what you did? Limited to that time frame, the summer of '92?

A. Some time in July of 1992, I received a phone call from Gene. He asked me to come to Philadelphia and to have a discussion with Gene and members of the CCR to comment upon a proposal that was being made concerning what the medical criteria were or would potentially be for a settlement that was being contemplated with the CCR.

Q. Did you come to Philadelphia?

A. Yes, I did.

Q. Did you have a meeting, and where was that meeting?

A. I went to Gene's home and I found John Aldock there, and David Beers and Gene was there, and it seems to me like there was one other person there.

And they presented two or three or four-page document to me that related to medical criteria, and they wanted to know my reaction to it, what I thought about it, and they wanted to know what I thought other plaintiffs counsel might think about that criteria.

Q. Did you make comments to them and give them reaction?

A. I reviewed it and I didn't like it, and I criticized it. And we engaged in a debate about it for about an hour.

Q. Was that a friendly debate?

A. It was not particularly friendly, but it was frank, robust —

[Tr. 90] Q. You said Mr. Beers was there, right?

A. Yes.

Q. Did you debate with Mr. Beers?

A. Yes.

Q. Do you want to describe what that experience was like for us?

A. He —

Q. What happened after your debate with Mr. Beers in your discussion?

A. I expressed my view that the proposal needed significant change, and that I didn't agree with a lot of things that were in it. I made my feelings known, and I expressed the view that I didn't think the plaintiffs bar generally would accept what was in that proposal.

And having said my peace and had my argument, I took Gene's wife out to dinner and I left Gene to continue the discussion. I got back about 11:30 that night, he was still talking to the defendants, and I went on to bed and got up the next morning and flew back to Newport News.

Q. Had the — when you returned around 11:30 that night, was the nature of the exchange that was taking place between Mr. Locks and the representative CCR any different or was it any friendlier?

A. They were talking about — I don't know what they were talking about to tell you the truth. I —

[Tr. 91] Q. Okay.

A. Gene told me that the negotiations were — well, I didn't want to know.

Q. Okay.

A. I stayed out of whatever the discussion was. I had been asked about what they wanted me to comment on. I made my comment and I wasn't invited to participate in anything else.

Q. And you returned to Newport News the next day?

A. Yes.

Q. All right. Now, after that meeting with Mr. Locks and the CCR representative, when was your next contact with anyone concerning the CCR global discussions?

A. In September of that same year, 1992, I received a call from Ron. Ron at that time advised me —

THE COURT: Mr. Motley, you mean?

THE WITNESS: Yes, I'm sorry, your Honor. It's been a first name —

THE COURT: He's Ron to everyone in the world except to Judge Reed.

MR. RICE: Some people call him other things, Judge.

THE WITNESS: I apologize, your Honor.

Mr. Motley called me, asked me to come to South Carolina, that he wanted to make a presentation to some of his co-counsel, again to get our comments on matters that he was discussing with the CCR.

[Tr. 92] So I went to South Carolina. I believe a number of other people joined me there at your office in Charleston.

BY MR. RICE:

Q. When you say other people, were these other attorneys?

A. Yes.

Q. Did you know those attorneys from past experience in the asbestos litigation?

A. Some I knew, some I didn't. Richard Scruggs I met for the first time, he was from Mississippi was there. Danny Cupid from Mississippi was there. Gary Kendall from Virginia was there, he's my co-counsel in Virginia, or I'm his co-counsel, whatever.

And those were the lawyers that I can remember off the top of my head who were there.

Q. Tell us what happened during that trip to Charleston?

A. In the morning, you made a presentation to us of about an hour, in which you outlined the things that were being negotiated with the CCR, and you outlined the medical criteria, and you asked for comment and criticism by the group. There was —

Q. Did I receive comment?

A. You did indeed.

Q. Did I receive criticism?

A. Yes, both. And we made a number of suggestions of things that we didn't like, things that we thought out to be [Tr. 93] improved, and people made various comments about it.

Q. Was the document and the materials, the medical area that we discussed in Charleston in late September, early October 1992, significantly different than what you had discussed in the summer of 1992 in Philadelphia?

A. The medical criteria had been substantially improved, but I still didn't — there were still a number of things about it that I and others didn't like.

The other portion of the agreement, proposed agreement at that time, I hadn't heard any of before, so it was all brand new information to me. That I didn't know anything about.

Q. Now, other than the meeting with the attorneys to discuss the proposed agreement, did you meet anyone else at that meeting and discuss the CCR global discussions at that time?

A. Yes. I met Professor Freeman who was introduced to me as an ethics professor from the University of South Carolina. And the group of us went to lunch with him, and talked to him about the ethical issues that we could think of that might come up from this type of an action.

I think Charles Patrick of your office accompanied us to lunch, and Professor Freeman expressed the view in that luncheon —

Q. Don't tell me what he said, just —

A. Okay.

[Tr. 94] Q. Was there an open and full discussion that day with the plaintiffs attorneys that we invited in of the CCR negotiations and global discussions?

A. Yes.

Q. And there was exchange of information, both —

A. Yes.

Q. — criticism and support?

A. Yes.

Q. Now —

THE COURT: We're going to take a break, Mr. Rice.

MR. RICE: Okay.

THE COURT: 15-minute recess.

(Recess, 11:07 o'clock a.m. to 11:26 o'clock a.m.)

THE COURT: Welcome back everybody. Mr. Hatten, please be seated.

BY MR. RICE:

Q. Mr. Hatten, I think we finished our discussion about your visit to Charleston, and the meetings in Charleston.

When was the next time you attended a meeting where the subject of the CCR global discussions took place?

A. I had a very large meeting in Miami Beach, the Coconut Grove Hotel, I believe in November 1992.

Q. Was this what we call an ALG meeting?

A. Yes.

[Tr. 95] Q. And was it combined with what's referred to as the Ness, Motley co-counsel meeting?

A. Yes, it was.

Q. Can you give the Court some estimate of the number of lawyers that were present at that meeting? Plaintiffs' attorneys representing plaintiffs' victims?

A. There was a very large conference room, and my best estimate would be that it exceeded a hundred lawyers.

Q. And did you attend that meeting?

A. Yes.

Q. And do you know who called the meeting?

A. I think Ron Motley called the meeting.

Q. All right. Were there attorneys there from all over the country?

A. Yes.

Q. At that meeting, during your attendance, was there full explanation of what the discussions were with CCR and what the proposed settlement consisted of?

A. Yes.

Q. Was there exchange of information back and forth among those making the presentation and those in attendance listening to the presentation?

A. Yes. There was a comprehensive presentation, followed by extensive questioning.

Q. How long did that discussion take place, do you recall?

[Tr. 96] A. A number of hours.

Q. From your being present at that meeting, from your 10 years plus experience in this litigation, from your personal involvement with the attorneys that were present at that meeting, your personal experience with them, what was your perception of the reaction of the plaintiffs' bar that was present at the Miami meeting in November of '92 to the CCR settlement agreement?

A. My perception that there was a very broad based large majority of lawyers there, who supported and welcomed the agreement.

Obviously, in a group that size, it was not unanimous. But there were far fewer people that spoke in opposition to the plan than those who supported it. And there was a general sense of relief that finally something was happening.

There had been a great of frustration in the MDL, and this was viewed by most according to my perception as a good thing.

THE COURT: Excuse me for interrupting, but did you leave out the fact of who was at the meeting. A hundred lawyers, but who — other than them being plaintiffs' lawyers.

BY MR. RICE:

Q. Well, through your experience in the litigation over the [Tr. 97] last 20 years, the attorneys that were present at that meeting, and the law offices that were represented, do you have an estimate as to what percentage of the existing volume of asbestos cases were represented at that meeting?

MR. BARON: Your Honor, foundation, objection.

THE COURT: Well, first of all, we'll find out if he's able to do it at all. Answer yes or no to that, and then we'll see. The objection's overruled, just for a yes or no answer.

THE WITNESS: Yes.

MR. RICE: And could you tell us —

THE COURT: How did you reach that conclusion? Lay the foundation if you can.

BY MR. RICE:

Q. And how did you reach the conclusion — well, from time to time in the asbestos litigation, in your involvement with the MDL, was there a necessity to gather some information about where the cases were filed and who had the cases, and what law firms represented what percentage of the people?

A. Yes. In the MDL, Judge Weiner had asked all the lawyers in federal court to file affidavits of how many cases they represented and where they were.

He had asked also for affidavits of both federal cases and state cases that people had. So there had been discussion from time to time as to where all the cases were, [Tr. 98] and who had most of the cases, and based upon working with the plaintiffs' bar, there was a general — I had a general understanding of who had the large blocks of cases and where the cases came from.

Q. And in the work you had done in the bankruptcy committees, was that information also supplied in general terms?

A. That's correct. And it was repeatedly said that those steering committees in the bankruptcies and the steering committee of the MDL represented 75 percent or more of the cases nationwide. Or if they didn't directly represent them, they represented them in co-counsel relationships, and I have had that caveat.

Q. All right. So Mr. Hatten, what is your bottom line opinion as to what volume of the current litigation was represented at the Miami November '92 meeting?

MR. BARON: Objection, foundation.

THE COURT: Overruled.

THE WITNESS: Based upon the people who were there and the number of people who were there, all of whom were plaintiffs' counsel, from all over the United States, I thought that that room probably represented 85, 90 percent of the cases. That was simply my perception, but based upon what I had understood.

BY MR. RICE:

[Tr. 99] Q. In addition to that volume of the existing cases being represented at that meeting, were there representatives from most, if not all of the jurisdictions in the country that you're aware of that have asbestos litigation?

A. Yes.

Q. You told us you attended that meeting and you were in the meeting, right?

A. Yes.

Q. There's been a representation made in this case that at some during that meeting there was some type of statement made to the extent that you ought to file all your cases now to avoid being treated as futures. Do you recall anything like that being discussed?

A. No.

MR. BARON: Your Honor, I talked with Mr. Baron during the break, and he had some concerns about his out-of-town witness. I spoke with Mr. Hatten and this is a convenient stopping place and we have no objection if Mr. Baron wants to take his witness out of turn. Mr Hatten's agreed, he could be here tomorrow morning if necessary.

MR. BARON: No, your Honor, that's not what I wanted to do.

THE COURT: Are you finished with his direct with him before we —

MR. RICE: No, sir, I have not. But I had agreed —

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TESTIMONY OF ROBERT HATTEN

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[Tr. 8] THE COURT: You may. It doesn't look like the same paper. It's the different thing.

BY MR. RICE:

Q. The document I just handed you, would you tell us what that is and tell us the connection between that and 218?

(Pause in proceedings.)

THE COURT: First identify what it is and —

BY MR. RICE:

Q. Mr. Hatten, would you do that since you have the only copy?

THE COURT: — it's very unusual that you don't give it to other counsel. It may be a minor matter but ...

THE WITNESS: On April the 23rd, 1993, Fred Baron had copied me with some pleadings that he had filed in this action and he had asked for my comments and my views.

And I had responded to his letter asking for my views with this letter.

BY MR. RICE:

Q. So your letter of May 4th is in response to Mr. Baron's letter of April 23rd?

A. Correct.

Q. What was the point you were getting across in the letter to Mr. Baron in your view?

A. Well, there are a number of points that I was trying to make in the letter.

[Tr. 9] Q. Would you share them with us, please?

MR. BARON: Well, your Honor, the letter speaks for itself.

THE COURT: Bear with me just a second.

It's a brief letter, let me read it to myself since I haven't before.

(Pause in proceedings.)

THE COURT: I read the letter. And your question is what point was he trying to make with the letter?

MR. RICE: Yes, sir.

THE COURT: And the objection is the letter speaks for itself.

Objection sustained. The letter couldn't be any clearer to me.

BY MR. RICE:

Q. Mr. Hatten, would you tell us what you meant by irresponsible lawsuits?

A. Yes. I made an allusion to it yesterday in the fact that there were thousands of lawsuits that had been filed since the late 1980s in the state and federal courts for people that had unimpaired changes on their chest x-rays that were arguably caused by asbestos exposure that I didn't think should be in the tort system at all.

They were the result of indiscriminate screenings in which people had screened thousands of workers and once the [Tr. 10] screen was done, then those lawyers effectively triggered statutes of limitations for thousands of people that had minimal changes on their chest x-rays and therefore were forced to get into the tort system.

And so I was expressing a view that I had expressed many times before that the plaintiffs' Bar needed to file their claims with more discretion and better judgment. And they had not been.

Q. Did you review the medical criteria of the stipulation of settlement when you reviewed the document generally?

A. Yes.

Q. And was the medical criteria that you reviewed in the January 15th, 1993 stipulation significantly different than the medical criteria that you had discussed in the Charleston, South Carolina meeting?

A. Yes. The criteria that were in the final agreement were different from the criteria that — they were substantially different from the criteria that I had seen the first time in July of 1990 to Gene Locks' house. They were substantially different from the criteria that I saw in Charleston and they were substantially different from the criteria that I saw in Miami. There were changes.

So it was a much improved document over where it had begun and every time I looked at it — I mean in the four times I had an opportunity to see it, it had changed each [Tr. 21] expanded it to the tort system in general.

And as Mr. Rice will know that it's Mr. Hatten's practice to —

THE COURT: All right. Form of the question is flawed, the objection is sustained. Redraft if you want.

MR. RICE: Mr. Hatten —

THE COURT: Recraft.

BY MR. RICE:

Q. — in your experience, tell us what your views are about the trade-off within the Georgine settlement as it relates to the pleural unimpaired claims?

A. All right. There are a number of substantial benefits to those persons that have unimpaired pleural changes in my opinion from the tort system.

First of all, in most cases in the tort system, if you bring a claim for pleural injury and you later develop cancer, then that claim is going to be barred by your earlier claim for an unimpaired pleural condition.

So you are forced to base your entire damages upon the speculation that you might get cancer in the future, and in many jurisdictions that evidence is not admissible.

And so you have a minimal damage case that you are forced to try even though you may get a very serious disease in the future and die of it. I've had cases, for instance, that were defensively filed in the early 1980s because of the [Tr. 22] statute of limitations in Virginia that required them to be filed, where people had a pleural disease, settled for a pleural disease and then five years later got mesothelioma. And they couldn't come back, they were out of luck in the tort system.

So the settlement provides an opportunity for a person with pleural change to actually come back twice. If they only have pleural change, they can come and get compensation when they

have asbestosis, they get a limited release, and then they can come again if they get cancer.

Secondly, the statute of limitations on these claims is told, so there is no prejudice to these people from the delay.

Thirdly, when they do contract a disease, one of the significant factors that will be preserved in this agreement is the historical value that would have applied for people with asbestosis or cancer in the jurisdiction where they live. That will be available to them in the future.

Whereas right now, if they simply had a pleural case and took a green card, there would be no expect — there would be no way to predict what they would get in the future.

Another major advantage is, if these people get sick in the future and get asbestosis or get mesothelioma, all of the defenses that we've had to put up with in the tort system, except the medical condition and the exposure [Tr. 23] evidence, all of those defenses are waived. To me that's worth a lot.

And every case now in the tort system, for instance in Virginia, and I think in a majority of states, state of the art is a defense, and lots of other defenses. Liability is never a given, it's something you have to prove, so a waiver of those defenses in the future.

The fact that this settlement is going to define what that future liability is, I think gives that person greater security that the assets will be available to pay him in the future than at the present time.

The agreement provides for a ten-year commitment, a ten-year written contract, and that's a substantial period of time for these funds to be available, and I think it enhances the financial security of the defendants in the case.

The fact that if they get sick, the numbers will be historical and it will be a limited release. I'm trying to think of other things that may be in there. And those are some of the things that come to mind. I may have left some out, but...

Q. You made the comment that —

A. One other — one other thing is that if they get sick in the future and they get a diagnosis that meets these criteria, they don't

have to worry about the defendants coming with a doctor who will contradict their doctor.

[Tr. 24] So long as they have a reasonable doctor who is a qualified pulmonary specialist, and their diagnosis meets these criteria, they don't have to worry about a battle of experts in the courtroom.

And I guess lastly is the enormous savings of costs that are available to the client from this deal, if he gets sick in the future. The transaction cost of the trial, and my experience has been that an individual trial will normally cost a minimum of $20,000 and a minimum of two weeks to try for one plaintiff.

There will be reduced attorneys fees so he'll be able to keep more of the money that he does get in the future. And on the medical diagnosis, he doesn't have to worry about some professional witness coming in and saying that his doctor who is a pulmonary specialist is wrong if the diagnosis meets certain recognized criteria.

So I think there are great benefits in this that are not available in the tort system, and the present remedy for anybody in the tort system right now, is simply a green card. And a green card simply postpones into the future indefinitely what that person may be able to accomplish. And then all of the uncertainties, all of the costs, all of the delays of the tort system are simply postponed for that individual.

And one final thing. Under this system if you [Tr. 25] qualify, you get your money very quickly, in six months under this agreement or less. That's a substantial improvement over the present tort system. So it gives him a certainty that if he does qualify, you know, he'll get paid.

There are lots of benefits here that are unavailable in the tort system, and in my opinion are a bundle of opportunities and rights that simply don't exist now in the tort system.

MR. BARON: Your Honor, I move to strike.

THE COURT: Grounds.

MR. BARON: There was no explanation as to what law he was referring to when he made his comparisons. There wasn't a

description of whether he was talking about the law of 50 states, the law of Virginia, or what it was he was describing.

It was just a general description without reference to any state law, and the law varies from state-to-state on all of these issues, and so it provides no relevant information.

THE COURT: Motion is overruled. Cross-examine on it, plus the witness himself said it varies in certain states, said it's so in his own testimony

BY MR. RICE:

Q. Mr. Hatten, you mentioned in part of your comments, the

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BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

MDL-875

[Caption Omitted]

**PLAINTIFFS' RESPONSE TO
MDL-875 ORDER TO SHOW CAUSE**

SECTION I

This Response is being submitted by the firm of Wilentz, Goldman & Spitzer, P.C., on behalf of its own clients and on behalf of the clients of the law firms of Weitz & Luxenberg, P.C.; Peter G. Angelos, Esq.; Ness, Motley, Loadholt, Richardson & Poole, P.C.,; Maples & Lomax, P.A.; and Henderson & Goldberg, P.C. The parties and actions represented are as follows:

Wilentz, Goldman & Spitzer:

- D. New Jersey — 17 actions/142 plaintiffs
- S.D. New York — 7 actions/7 plaintiffs
- 3,000 plaintiffs in New Jersey and New York State Court Actions

Weitz & Luxenberg, P.C.:

- E.D. New York — 2,000 plaintiffs
- Manhattan Supreme Court — 2,000 plaintiffs

Peter G. Angelos, Esq.:

- D. Maryland — 113 actions
- State of Maryland — 11,000 plaintiffs

Ness, Motley:

- In excess of 20,000 federal or states cases in more than 40 jurisdictions.

Maples & Lomax, P.A.:

- Mississippi State Cases — 1,100

Henderson & Goldberg, P.A.:

- N.D. Iowa (East) — 5 actions/5 plaintiffs
- N.D. Iowa (West) — 2 actions/2 plaintiffs
- S.D. Iowa — 1 action/1 plaintiff
- D. Maine — 59 actions/59 plaintiffs
- D. Maryland — 171 actions/171 plaintiffs
- E.D. Michigan — 18 actions/18 plaintiffs
- W.D. Michigan — 9 actions/9 plaintiffs
- N.D. New York — 109 actions/109 plaintiffs
- W.D. Ohio — 122 actions/122 plaintiffs
- M.D. Pennsylvania — 24 actions/24 plaintiffs
- W.D. Pennsylvania — 216 actions/216 plaintiffs
- N.D. West Virginia — 2 actions/2 plaintiffs

New Jersey State Council of the International Sheetmetal Workers Association

Systems Council International Brotherhood of Electrical Workers (New Jersey)

International Union United Automobile, Aerospace and Agricultural Implement Workers of America (NY; NJ; Penn)

United Union of Roofers, Waterproofers and Allied Workers
Local Union 30-30B

White Lung Association of New Jersey

SECTION II & III

This Response is limited in its scope to the issue of whether mandatory pleural registries should be established as a dispositive technique to clear the backlogged federal asbestos docket in the event an MDL transfer takes place. In the interest of brevity and judicial economy, we have attempted to coordinate this Response with other members of the plaintiff's bar. Thus, the specific issue of MDL transfer will be addressed by other plaintiff's counsel in their response to this Court's Order to Show Cause.

SECTION IV

In light of the indication by the Judicial Panel on Multidistrict Litigation that it will consider the institution of mandatory pleural registries as a dispositive technique to clear backlogged asbestos dockets, the parties submitting this Response add the following response concerning that issue.

PRELIMINARY STATEMENT

In its most recent visit to asbestos litigation, the Judicial Panel on Multi-District Litigation (the Panel) has invited comment concerning the use of mandatory "pleural registries" as a "dispositive technique[ ]" to solve the backlog of cases in federal asbestos litigation. *In re Asbestos Products Liability Litigation* (No. VI), Docket No. 875, at 2, reprinted in *Asbestos Litigation Reporter* (February 1, 1991) at 22430. Presumably, this technique would be used to remove from the active court docket actions instituted by victims of asbestos exposure who have developed some form of pleural disease. These victims would not be permitted to sue for damages unless their condition worsened from pleural disease to some other asbestos-related disease accompanied by some arbitrary threshold disability rating. Plaintiffs submit this brief in opposition to any such plans.

Plaintiffs are not unaware of the plight of the federal courts to manage a docket burdened by backlogged drug cases, other federal criminal cases and complicated civil matters. Plaintiffs further recognize that recently enacted statutes have spawned new areas of civil litigation and have added to the already overburdened federal docket. Recognizing too that the asbestos litigation may appear to be fertile territory to which the federal bench may look to begin to

reduce its docket, plaintiffs nevertheless urge the Panel to recognize that this complicated dilemma is multi-caused and should not be "solved" by the judiciary by wiping away the rights of thousands of innocent victims of the defendants' asbestos products.

A notion implicit in the proposed use of a mandatory pleural registry is that, as a matter of law, plaintiffs with pleural disease have not sustained any damages for which a remedy is warranted. This notion, however, is mistaken. The asbestos manufacturers have, themselves, presented a most forceful argument that asbestos fibers cause injury to lung tissue almost immediately after they are deposited in the lung, damaging cells and adjoining tissue. That position is buttressed by the continually mounting medical research concerning the functional and pathologic injury sustained by pleural disease victims.

POINT 1

PLEURAL DISEASE CONSTITUTES AN INJURY FOR WHICH THOSE AFFLICTED ARE ENTITLED TO COMPENSATION

The law is well settled that in order for a plaintiff to prevail in any tort action, he or she must demonstrate that defendant's tortious conduct proximately caused some damage or injury. *See* W. Prosser, *The Law of Torts* § 30 at 143 (4th ed. 1971). As a remedy for damages sustained as a direct result of defendants' wrongful conduct, plaintiffs are entitled to recover an award which provides some rough compensation for their losses. *See Dobbs on Remedies* § 3.1 at 136 (1973). These compensatory damages may be broken into two categories: (1) general damages, which compensate the plaintiff for any physical injury, alteration, pain, disability, suffering and emotional distress; and (2) special damages for the economic losses a plaintiff may sustain as a result of a defendant's wrongful conduct. *See In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Hawaii 1990).

The law is equally clear that general damages are available to any person who suffers a legally recognized injury, which is the proximate result of another's wrong. *Dobbs on Remedies* § 3.1 at 135 (1973). The principal question raised by the Panel's suggestion to create a mandatory pleural registry is whether asbestos-induced

pleural disease falls within the realm of injury which is "legally recognized," and, therefore, compensable.

As will be hereinafter set forth, those individuals afflicted with pleural disease suffer physical and emotional injury which the law recognizes and for which they are entitled to be compensated. *See Powell* v. *Ward*, 643 F.2d 924 (2nd Cir. 1981), *cert. denied*, 454 U.S. 832, 102 S.Ct. 131, 70 L.Ed. 2d 111 (1981). Even if this Panel is reluctant to find pleural disease compensable as a matter of law, it should *not* find that such injuries are *not* compensable as a matter of law. The issue is one of fact, and given the substantial evidence supporting the plaintiffs' position, this panel may not invade the province of the trier of fact. *Howell* v. *Celotex Corp.*, 904 F.2d 3, 5 (3rd Cir. 1990)[1]

No precise definition of the term "injury" exists in the context of "personal injury." A. Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 Rutgers L.J. 343, 351 (1987). However, the generally accepted notion is that one has suffered an injury where the individual has experienced an invasion of one's interest in personal physical security, producing a harmful effect. *Id.* at 348 (citing *Restatement Second of Torts* § 7 (1977)); *see Id.* at 351.

There is little question that each plaintiff with pleural disease has experienced an invasion of his or her interest in personal physical security. As a result of the defendants' tortious actions of manufacturing and selling deadly asbestos and asbestos-containing products, the plaintiffs have been exposed to asbestos fibers which they have inhaled and which have caused physical damage to the pleural lining of the plaintiffs' lungs. *See* color surgical photographs of lungs afflicted with pleural disease, attached hereto as Exhibit B.[2]

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[1] Juries in a number of jurisdictions have found pleural disease to be a compensable injury. *See* examples of Exhibit A.

[2] The light area depicted in the photographs represents pleural thickening.

There is little question that this invasion of asbestos fibers into the plaintiffs' personal physical security produces a harmful effect. In the context of this litigation, the asbestos producers continually argue that because many individuals with asbestos-related disease do not appear functionally abnormal upon the administration of simple and crude pulmonary function testing, they are not injured and therefore not entitled to compensation under our system of justice. This is so, even though the individuals so affected continually maintain complaints of shortness of breath. *See* Point I.A.I., *infra*, concerning the effect of pleural disease on lung function. It is interesting to note, however, that when many of these same companies instituted litigation to maximize their insurance coverage for asbestos disease claims, the story told in terms of whether the so-called non-impaired individuals are "injured" was quite different.

According to the asbestos producers own *Proposed Findings of Medical Facts* attached hereto as Exhibit C, filed in the California insurance litigation, asbestos fibers deposited in the lung "cause mechanical *injury* to cells and adjoining tissue." *Id*. at 14. "This mechanical *injury* occurs within minutes or hours of the deposition of asbestos fibers in the alveolar region of the lung and continues for as long as asbestos fibers remain in the lung." *Id*. at 15.

The pathogenesis of asbestos disease as described by the asbestos companies further indicates that *injury* occurs long before a patient becomes symptomatic. The deposition of asbestos fibers in the lung results in the "*damaging* of digestive enzymes" and causes "toxic substances" to be released "which *eat away* at the surrounding tissue." *Id*. at 19. According to the asbestos producers, a majority of the medical experts believe that:

> *(I)njury* and the onset of fibrosis occur soon after the initial deposition of asbestos fibers in the lung of an occupationally exposed worker..." *Id*. at 21. "Countless asbestos fibers permanently retained in the lung during the occupational exposure continue to cause *injury* and elicit a fibrogenic response." *Id*. at 26. ... "There is no real dispute within the medical community over the fact that *injury* and fibrosis resulting from occupational exposure to asbestos continue to progress indefinitely following the cessation of exposure. *Id*. at 30 (emphasis added).

The asbestos companies further admit that the reason workers injured by asbestos exposure do not immediately exhibit abnormal findings on administration of simply pulmonary function tests is not because the lungs have not been injured, but because the lungs have a considerable reserve capacity all of which must be destroyed before noticeable symptoms become evident. In fact, when the same issue was raised with Owens Corning Fiberglas (OCF) by their own employees, OCF explained:

> Even if asbestos causes scarring in the lungs and the doctor diagnoses asbestosis based on history, chest x-ray, lung function tests, and listening to the lungs, the lungs have a great deal of reserve capacity. Until this reserve capacity is used up, a person could have no symptoms and be able to work or exercise normally.[3]

Because of the lungs' reserve capacity, "an otherwise healthy individual can actually function normally with one entire lung removed. ... Similarly, an adult can lose the function of at least a third, and probably half of the individual alveolar/capillary gas exchange units constituting the lung parenchyma without experiencing any noticeable symptoms or presenting any clinical measurable signs." *Id*. at 8-9. In other words, up to 150 million of the 300 million aveoli that comprise the totality of the lung, may be destroyed by asbestos exposure before crude pulmonary function tests will detect such destruction. *See Id*. Similarly, Dr. Craighead, a medical expert who frequently testifies on behalf of the asbestos industry, approximates that *15 to 25% of the lung is destroyed before asbestos disease is even evident on x-ray*. *See* January 23, 1991 deposition of John E. Craighead at page 16, attached hereto as Exhibit E.

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[3] *Questions and Answers Concerning Asbestos*, Prepared by D.J. Billmaier, M.D., after question and answer sessions at the Owens-Corning Fiberglas, Berlin, New Jersey plant (Final Draft Nov. 28, 1978), attached hereto as Exhibit D.

As a result of the presence of these asbestos fibers in the lung, the plaintiffs unquestionably have experienced a dramatic pathological change within their pulmonary systems, including, in the case of victims of pleural disease, marked scarring of the pleura. Although research into the effects of these pathological changes have been considered on the cutting edge of medical knowledge, *Wright* v. *Eagle-Picher Industries, Inc.*, 80 Md. App. 606, ___, 565 A.2d 377, 380 (1989), there is now a substantial and rapidly growing body of medical evidence that pleural disease is not only a visible pathological alteration of the pleural surface, but that it also causes or is associated with physical disabilities such as (1) decreased pulmonary function, (2) an altered immune system, (3) an increased mortality rate and (4) emotional distress due to fear of developing cancer or dying from an asbestos-related disease in the future. In addition the to general damages associated with pleural disease, plaintiffs also experience special damages resulting in economic and financial loss.

A. GENERAL DAMAGES

1. Pleural Disease Impairs Pulmonary Function

The increasing prevalence of asbestos-induced pleural abnormalities as compared to parenchymal changes in many industrial populations studied in recent years and the accumulating evidence that pleural fibrosis does detrimentally affect pulmonary function and its clinical correlate, shortness of breath, has prompted recent investigations into the effect of pleural fibrosis on pulmonary function. Thus, despite the previously fragmented nature of the information on pleural asbestosis, recent studies have confirmed that asbestos-related pleural disease, without x-ray evidence of parenchymal involvement is independently associated with restrictive pulmonary function.

In a recent study, Dr. David A. Schwartz, *et al.*, demonstrated that asbestos-induced pleural fibrosis was independently associated with pulmonary function impairment, including reduced lung volumes, decreased diffusing capacity for carbon monoxide and diminished lung compliance. Affidavit of Dr. David A. Schwartz, at 1-2, ¶¶6-7, attached hereto as Exhibit F. Thus, asbestos-induced pleural fibrosis can cause respiratory symptoms in persons whose simple pulmonary function tests *appear normal*. *Id.* at 2 ¶10.

Dr. Schwartz's position is strongly supported by his study of sheet metal workers. After evaluating 1,211 sheet metal workers, Dr. Schwartz reached the following results. Three hundred thirty-four of the 1,211 sheet metal workers were diagnosed as having pleural fibrosis. Of that 334, 260 (78%) had circumscribed pleural plaques and 74 (22%) had diffuse pleural thickening. Considering only those with normal parenchyma (no roentgenographic evidence of

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TESTIMONY OF SAMUEL DASH

* * * *

[Tr. 172] BY MR. RICE:

Q. Good afternoon, Professor Dash. Would you —

A. Good afternoon.

Q. — tell the Court where you are currently employed and what your current position is?

A. Georgetown University Law Center at Washington, D.C., professor of law and director of the Institute of Criminal Law and Procedure.

Q. How long have you been at Georgetown University Law [Tr. 173] Center?

A. Since 1965.

Q. Would you briefly tell us the various courses that you take primary responsibility for teaching at Georgetown Law Center?

A. Professional responsibility, criminal procedure, criminal law, and a seminar in Congressional investigations.

Q. I want to go back and briefly talk about your educational background if we could.

Would you tell us where you got your undergraduate degree and when you received that?

A. Temple University here in Philadelphia in 1947.

Q. And then you went to law school after that?

A. I went to Harvard Law School. There was a period of time when I was in the service and I came to finish at Temple University and went to Harvard Law School and graduated with a JD degree in 1950.

Q. What was the Harvard Voluntary Defenders?

A. Harvard Voluntary Defenders was a student group that I founded in 1949 to provide some basis of representation for indigent defendants then being represented by the Voluntary Defenders of Boston who had very little resources and aides and I was able to recruit a number of Harvard Law students to assist them in that.

It has since become a major clinical program at [Tr. 174] Harvard where the students now practice under court practice rules in the court.

Q. Professor Dash, when I use the term "the private practice of law versus the academic area of law," do you understand what I mean?

A. Yes, I do.

Q. I want to focus on the time period after you received your degree from Harvard in law. Did you enter the private practice of law?

A. I did. There was an initial period I was a teaching fellow at Northwestern University Law Center, but from there I went to the Justice Department, the United States Justice Department in the appellate section of the criminal division and from there I came back to Philadelphia as chief of the appeals division of the District Attorney's Office.

Q. All right. Let's talk about some time frames.

A. All right. In 19 — I was in Washington in the Justice Department in 1951.

Beginning in 1952, which was the beginning of Richardson Dilworth's term as District Attorney, I joined the District Attorney's Office here as an assistant district attorney, chief of the appeals division.

Q. Here in Philadelphia?

A. Here in Philadelphia. I began first assistant district attorney I believe some time in 1954 and I became District [Tr. 175] Attorney by appointment of the Common Pleas Court Judges to fill the vacancy when District Attorney Dilworth ran for mayor in 1955. And I served out that term.

Q. All right. During your 1951-1956 time frame, did you actively participate in the private practice in appellate work?

A. Yes. I'm not — it was private practice but on behalf of the Commonwealth of Pennsylvania.

Q. Right. Could you give us an estimate of the number of cases that you personally during that period of time handled in the appellate courts in the Pennsylvania area?

A. I would say about 2,000.

Q. Now —

A. I also tried a number of cases before I became first assistant in the Quarter Sessions Court as an assistant district attorney and I would say dozens of trials.

Q. Okay. Now, in 1956 you made a career move. What did you do?

A. In 1956, I left the DA's Office and became a partner in a law firm known as Blank and Rudenko. It's since changed its name and had many more lawyers but I became a partner there. And stayed at Blank and Rudenko as a partner until 1958 when I joined with another lawyer, Abram J. Bremlevy (ph), to form a partnership here in Philadelphia known as Dash and Levy and we primarily practiced as trial lawyers in criminal cases.

[Tr. 176] Q. And during that period of time, can you give us an estimate of the number of cases that you actually tried or participated in the trial on?

A. I would say it had to be in the dozens. We were very active. Most of our clients came by referral from Philadelphia law firms that didn't handle criminal cases and since I had been District Attorney, I was trusted to be able to handle them and I used to handle quite a large number of trials of criminal cases.

Q. Right. Then approximately 1963 or so you made another career move?

A. In 1963, I was asked by the City of Philadelphia, a group of public welfare groups and the Mayor, to head up the city's poverty program. The Ford Foundation was giving a large sum of money and the Federal Government was to experiment in a — in developing North Philadelphia from a various point of view of not housing but social programs, law programs and I became the director of what was then called the Philadelphia Council for Community Advancement. And served a board that was made up of both city officials and health and welfare officials.

And I continued to do that until 1965 when I was invited by Georgetown University Law Center to join their faculty as a full professor.

Q. All right. And you did go to Georgetown at that time?

A. Yes, I did.

[Tr. 177] Q. What was the D.C. Judicial Conference Project on Mental Disorders?

A. At the — that project was a project of the D.C. Judicial Conference headed up at that time by Chief Judge David Bazlon (ph) to make a study of how the court system and the law system was handling mentally ill people.

And I was asked by Chief Judge Bazlon to direct a staff of lawyers to serve the conference by looking into community mental health facilities, the St. Elizabeth's Hospital in Washington, and come up with recommendations which we made then at each meeting of the Judicial Conference of the District of Columbia Circuit and all of our recommendations were adopted by resolution and this took about four or five years and there was grant money to support us from the National Institute of Mental Health.

Q. Now, when you began teaching at Georgetown Law Center in 1965, did you give up the trial work as an attorney and concentrate on appellate work and teaching?

A. Well, yes. My responsibilities and duties as a law professor is to the school and to my students and taking on a trial would interfere with that responsibility, so I continued my active role as a lawyer in addition to being a professor by consulting with law firms and accepting appellate cases and being very active in the American Bar Association.

[Tr. 178] Q. Right. But you did not do any more what I'll call —

A. No more trial cases.

Q. — jury trial work?

A. No.

Q. From 1965 to the current time, have you continued to routinely and regularly handle appellate work in the various courts around the country?

A. Yes, I have, in both state courts and courts of appeals and in petitions for certiorari to the Supreme Court.

Q. And what Bar Associations are you currently an active member of?

A. The Pennsylvania Bar Association, the Philadelphia Bar Association, the Illinois Supreme Court Bar, the District of Columbia Bar and a number of federal courts and district courts.

Q. Right. Now, overlapping —

A. And the Supreme Court of the United States.

Q. Overlapping your teaching responsibilities at Georgetown, have you taken on additional work in the area of the practice of law that is not in front of a jury or an appellate court but doing other consulting work?

A. Well, more than — well, yes. I've been asked by a number of Congressional committees to consult on various issues of ethics and various issues of procedure in the legislature.

[Tr. 179] I was asked by Senator Sam Irvin in 1972 — 3, excuse me — in January of 1973 to become chief counsel and staff director of the Senate Watergate Committee and I served in that capacity which was basic — and I took a leave of absence from the Law Center — which was basically being a trial lawyer in a legislative arena.

And I've taken on since similar positions. In 1983, I was asked by the president of the senate of Puerto Rico to supervise and train their staff to conduct a major senate investigation of Puerto Rico involving a political murder that involved the government of Puerto Rico. And I was asked by the senate — and that was in 1983 till 1992.

And in 1985, I was asked by the senate of Alaska to head up and become chief counsel of the impeachment committee to impeach the governor of Alaska, since I've been involved in a number of international inquiries and investigations, and consultations.

Q. Throughout your — let's go back to the 1973-74 time frame when you were chief counsel and staff director to the U. S. Senate Select Committee on the Presidential Campaign. We'll refer to it as the Senate Watergate Committee. Would that be fair?

A. Yes.

Q. Did you develop any experience in the area of collusion during that investigation?

[Tr. 180] A. Well, I would say that — yes. The answer's yes to that and much of our investigation and research and staff work was done in matters involving collusion of a criminal or quasicriminal or civil matter during the Watergate investigation.

Q. Now, during 1976, I understand that you were involved in the investigation here in the Commonwealth of Pennsylvania. Can you tell us what that was about?

A. Yes. I was asked — at that time, there was a special prosecutor had been appointed to investigate police corruption in Philadelphia and it ended up where he wasn't fired but he had to leave office because the general assembly of Pennsylvania ended his budget, so he was starved out of office in a real sense.

And since the funds that had paid for that special prosecutor came from federal funds, there had to be an investigation or an evaluation and I was appointed by the Attorney General of Pennsylvania to come to Philadelphia and investigate the cause of the demise of that special prosecutor and I conducted a six-months investigation here and wrote a report that was widely publicized.

Q. And what is the National Association of Criminal Defense Lawyers?

A. That is today a very major national organization of lawyers who practice criminal defense law. It probably is one of the most prominent and powerful Bar Associations in [Tr. 181] the country. In 19 —

Q. Did you have any role in the 1950s —

A. Yes.

Q. — with that association?

A. Yeah. In 1958, while I was practicing defense law here in Philadelphia, it occurred to me that defense lawyers all over the country were basically loners, practiced quite differently than commercial lawyers in big firms and that there were all kinds of questions concerning their ethics, professional responsibility and there was a lot of negative image with regard to them.

I decided to meet with a number of very prominent defense lawyers and I founded the National Association of Criminal Defense Lawyers in 1958 and in the beginning we primarily were attempting to develop the image of the defense lawyer as a lawyer like any other lawyer representing clients and I led seminars on professional responsibility and ethics and all other kinds of ways in which we could upgrade both the lawyers themselves and their image.

Q. Did you subsequently become president of that national organization?

A. Yeah, I became president of it the second year. I was vice president the first year.

Q. Professor Dash, have you been asked to get involved in some foreign countries in matters that involve the [Tr. 182] investigation of corruption, collusion and ethics?

A. Yes. I've been a member of the board of the National Association of Criminal — excuse me — of the International League for Human Rights which is frequently called upon to investigate human rights abuses and corruption in government.

And in, I would say 1972, I was asked to go to Northern Ireland where a tragic incident, called Bloody Sunday where British paratroopers had shot and killed and wounded a number of young Catholics in the bog site area, and it was my job to observe that, work with Lord Widgery (ph) who had been conducting an inquiry and write a report. That was in 1972.

Shortly afterwards in the same year, I was sent to the Soviet Union to intercede in a number of the dissenters, the trials, and to make myself known and I was able to bring back and rescue Valerie Chaletesi (ph), a disciple of Mr. Sakarov (ph), and to at least make a number of contacts with people in the Soviet Union and write a report.

Somewhere in 1980 I was sent to Chili [sic], because a number of human rights workers had been exiled and they had their case up on appeal. And I was able to observe the appeal and discuss the matters with the Justice of the Supreme Court of Chili [sic], and it ended up with that Court reversing the order of exile and allowing these union rights [Tr. 183] workers to stay.

Q. Have you had occasion to be asked to come to or to go to or been permitted, I guess would be the fair way to say it, to be permitted by the South African Government to get involved in a matter in South Africa?

A. Yes. In 19 —

Q. Would you tell us briefly about that?

A. — in 1985, I initially was invited to be a keynote speaker on issues of ethics and criminal law reform before a reform group in South Africa.

And while there, while meeting the secretary of justice in my capacity as a board member of the International League of Human Rights, I requested a meeting with Nelson Mandela in Polsmore (ph) Prison. And this was quite unusual, but I became the first American with cabinet approval to be able to meet with him, and I spent two hours with him, interviewing him and determining what his vision was for the future of South Africa.

And as a result of that, I briefed the officials of South Africa afterwards, wrote an article in the New York Times Magazine section, and continued to mediate and have been informed by South African officials and Nelson Mendela himself that I played a significant role in his release from prison.

Q. Throughout your career in the — maybe not in 1990s, but [Tr. 184] let's talk about the '70s and '80s, were you — did you have any role in education through the judge advocate general's offices?

A. Yes. Actually it began somewhere in the 1960s and it went all the way through the '70s. I had been very active in panels of the ABA, and in all other types of professional organizations in giving lectures on professional responsibility and ethics. It was very early. I believe I was one of the early lawyers who saw the necessity, not only with the bar itself, but with the public to really focus on the image of lawyers and their duty of responsibility to their clients and to the public.

And I was asked by the judge advocate general's offices of the Army, the Navy, the Marine Corp and the Air Force at different times to lecture to the jag (ph) lawyers in their particular areas, and

I did. And the Navy jag actually videotaped my lecture and sent it over — all over the world to jag officers wherever they were.

Q. And what generally was the nature of the lectures that you were asked to give?

A. Basically it was bringing home to these jag lawyers their role as lawyers and their duties to their clients, and all of the issues that I would teach at Georgetown University Law Center on professional responsibility. The duty of fiduciary responsibility, the duty of lawyer, confidentiality and all [Tr. 185] — and avoiding of conflicts of interest. All of the things that were very important for a lawyer, whether he's an Army, Navy, Marine lawyer or a lawyer in commercial practice or criminal practice.

Q. Professor Dash, in addition to the consulting work you've told us about, have you been active in the American Bar Association?

A. Yes.

Q. Would you tell us briefly how you got involved and what you've done in the American Bar Association —

A. Well, I was —

Q. — as it relates to professional responsibility and ethics?

A. — well, much of these — the various committees all involved professional responsibility and ethics. I did become chairman of the criminal law section of the American Bar Association.

In addition, I was appointed to the — in 19, I think 84, the standing committee of ethics and professional responsibility of the American Bar Association, which is the highest standing committee of the ABA, that has the only responsibility in the ABA to interpret definitively the original canons of ethics of the ABA, the code of professional responsibility, and finally the model rules of professional conduct. And I served in that capacity for six [Tr. 186] years.

I have served on a number of other committees, as chair, but most of those had to do with the administration of criminal justice.

Q. Throughout your career have you been asked to be a guess [sic] lecturer at any educational seminars where lawyers were there to be further educated and brought up to date on the — in the area of ethics and professional responsibility?

A. Yes. On numerous occasions. With American Bar, I have been invited regularly and just recently at the mid-year meeting in Kansas City to lecture on ethics and professional responsibility.

I have lectured before state and local bars on the same subject. I have participated and continual educational programs.

I have been asked by large corporations, such as Citibank to lecture to their in-house lawyers on professional responsibility and ethics.

And just last fall, I was an endowed lecturer of Haustra (ph) on a — sort of an anniversary program they had on ethics and professional responsibility.

Q. Have you from time to time since 1974 been asked to participate in further studies and reviews of what we have come to know as the Watergate incident?

A. Well, continuously the issue comes up because it was a [Tr. 187] major event. A tragic event in American history, and I have participated in various anniversaries of it constantly speaking at forums on the constitutional issues as well as the ethical issues, the Government ethical issues at various forums and universities, government agencies, civics groups.

Just recently, five colleges up in New England, Amhurst [sic] and Hampshire of Mount Julio, University of Massachusetts, one other, all got together in a consortium and I spoke to them on the issues of government ethics that came out of the Watergate issues and the separation of powers issues.

I've also been teaching ethics and professional responsibilities as I said for 35 years.

Q. Have you ever been requested by the Pennsylvania Bar Endowment to do a investigation into wiretapping and electronic eavesdropping?

A. Yes. In 1958, or closer to '59, I was asked to make — and at that time, it was the very first investigation, national investigation of electronic surveillance, and wrote the book as a result of it called the Eavesdroppers, which was the very first documentary that alerted the bar, the courts, and the public of electronic surveillance techniques. And, as a result of that book, I testified in Congress, the Safe Streets Act of 1968 was enacted and the Supreme Court

cited the book in reversing its *Olmstead* decision and placing [Tr. 188] wiretap electronic surveillance under the Fourth Amendment.

Q. Professor Dash, throughout your career, have you authored books?

A. At times. I've written three books, and I'm in the midst of writing another book. I've written articles, but more recently, I've spent my time instead of writing Law Review articles, I have been writing testimony before Congress, opinions and consultation advises to the Attorney General, and other statements that I have made which I can have a much more direct impact in reform in the ethics area.

More recently, the Attorney General has issued a proposed rule that would severely change Rule 4.2 on the Rules of Professional Conduct, and allow federal prosecutors to communicate with represented defendants.

And I was appointed by the Attorney General to be part of a working group to review that, and when we couldn't really agree on the Attorney General stepping back from that, I was appointed by the ABA just recently to write a long series of comments challenging that.

And I've been working also very closely with the Conference of State Chief Justices who also oppose the interference by the Attorney General in the administration of ethical rules by State Supreme Court Justices or State Supreme Courts.

So I've spent a lot of my time in that kind of [Tr. 189] writing and in that kind of consultation, rather than what is generally called a traditional law review writing.

Q. Did you also serve as a consultant to the National Association of Attorney Generals?

A. Yes, I have. And that was back in 1971, where I was invited by the National Association to help define the office of Attorney General, and help write the book for them, which is the fairly basic book that they now use, which sets forth both the responsibilities and role of a state attorney general.

Q. Professor Dash, have you received any specific awards in the area of legal ethics?

A. I received an ethics award from the University of Judaism in California. That's the old Warren award, and all kinds of plaques and things that lawyers do get when they speak.

Q. Including some honorary —

A. Honorary —

Q. — degrees?

A. — three honorary degrees. One at Georgetown, one of the — rarely does a university award its own faculty, but I was awarded from Georgetown an honorary degree. Temple University awarded me an honorary doctor's degree in law, and Fairchild University.

Q. Just so we stay current, Professor Dash, when was the last time you argued an appellate case in the State of [Tr. 190] Pennsylvania?

A. December 6th, I argued before the Third Circuit — of 1993.

Q. And when was The [sic] last time you actively participated in teaching law students in the area of legal ethics and professional responsibility?

A. Well, I would say just a matter of weeks.

Q. You're still ongoing teaching at Georgetown?

A. I'm still an ongoing professor, full-time professor and one of my regular courses is professional responsibility.

MR. RICE: Your Honor, at this time we would offer SP-902, which is a copy of Professor Dash's curriculum vitae as an exhibit.

THE COURT: Settling Parties' 902 is received in evidence.

(Settling Parties' Exhibit 902 received in evidence.)

MR. RICE: Your Honor, at this time we would offer Professor Dash as an expert in the field of legal ethics, professional responsibility and collusion.

THE WITNESS: May I state for the record that I have no water, your Honor?

THE COURT: You have none?

THE WITNESS: I have no water.

THE COURT: Well, I'll just call Harry Grace in and [Tr. 191] he'll come and get you some. Unless someone else wants to do it.

THE WITNESS: I'm sorry.

THE COURT: That's all right. I'm sorry we didn't have it. I better check mine.

The offer of Professor Dash be allowed to express opinions in the areas of legal ethics, professional responsibility and collusion, in accordance with Rule 702 et seq of the Federal Rules of Evidence, is accepted and Professor Dash will be permitted to testify in those areas.

MR. ROSENBERG: In that case I have no questions on voir dire your Honor.

THE COURT: Okay. I didn't know there were any.

MR. ROSENBERG: I don't. I'll save it for cross-examination.

BY MR. RICE:

Q. Professor Dash, you have been in court several days of the last few weeks?

A. Yes, I was in court since Tuesday of this week, and then prior to the last week, I was in court most of the preceding week.

Q. Okay. And you were here yesterday when we had the hearing concerning the rebuttal testimony?

A. Yes.

Q. And you understand that we're going to be focusing on [Tr. 192] some fairly narrow points, and —

Q. Yes, I do.

Q. — I want to try to listen to the question and focus in on those narrow areas that we're going to address.

First, I want to lay a little foundation. To the best of your recollection, when is the first time you and I met?

A. The first time that you and I met I believe was some time maybe in April or May, after we had had telephone conversations and correspondence, of 1993.

Q. Right. When I contacted you in April — or when I contacted you in 1993, what did I request you do?

A. You asked me to consider becoming an ethics expert and consultant to you with regard to what was then called the Carlough class action.

Q. And what did you request me to do at that time?

A. At that time I requested you to fill me in on quite a few facts. To send me all of the documents, including the stipulation of settlement, the Complaint, the Answer and any other materials that I would need to be able to preliminarily form a basis to respond to your request.

Q. Did I send you a few sheets of paper?

A. You sent me a lot of paper, and have continued to, and I did analyze everything that you gave me at the time. And I do recall that I did, either by telephone — I think by [Tr. 193] telephone to tell you that I had read enough and seen enough that I believe that at least for the time being, that I would be willing to be an expert witness on your role and the role of class counsel in both the Carlough class action settlement and also the negotiations and settlement for the inventory settlement that preceded it.

Q. Subsequent to my sending you the materials, and you getting back to me that you'd be willing to participate, did we then set up a meeting?

A. Yes, you did.

Q. And have we met on more than one occasion since April of '93?

A. Yes, we have.

Q. Can you tell the Court approximately how many hours you and I have spent either together or by phone dealing with what's now known as the Georgine class action?

A. You and I together I would say had to be about maybe 25 hours or so.

Q. And —

A. Some of them were long meetings together, and often long phone calls.

Q. — in addition to meeting myself, have you met with other persons from my firm and other persons from Mr — with Mr. Locks —

A. Yes, I —

[Tr. 194]

Q. — concerning this case?

A. — yes, I have.

Q. And what's the total amount of time that you believe you spent in consulting with us in the matter?

A. I would say it would be close to 150 hours.

Q. Now, when we met in Washington in the —

A. I believe it was in May.

Q. Okay, May of '93. Do you recall meeting at that time or shortly thereafter Mr. Locks?

A. Yes, I think Gene Locks was at the same meeting in May with you.

Q. When we started meeting, did we have general discussions about what would take place in a class action and how it would proceed?

A. Yes. You were initially asking me to review everything, first to determine whether what you had done so far complied with the rules of ethical conduct, and then you were asking me to advise you with regard to continuing in that role, particularly in areas such as notice and in following out your responsibilities as class counsel, particularly since you were presenting the class action before the Court under Rule 23 and would have to be making a good faith argument as to its fairness and also as your adequacy of counsel, and I was to advise you on those steps.

[Tr. 195] MR. BARON: Your Honor, we object and move to strike on the basis that he's clearly going to be testifying on conversations that he had with Mr. Rice and on information provided to him in oral conversations with Mr. Rice and other class counsel whom we have not been permitted to depose.

THE COURT: I don't think he's been asked to report on those conversations. I view this testimony as routine testimony of how

an expert got informed about the case. What he relies upon is provided for in the Rules of Evidence and he'll have to disclose that. If he does, we'll find out whether there are things that are regularly relied upon by experts like we've been doing with all of them.

MR. BARON: Yes, your Honor, and if he relies upon things such as his conversations with Mr. Rice, all of that should be stricken because of our inability to question Mr. Rice to determine the veracity of those issues.

THE COURT: Well, the objection is overruled. I could make a long speech about how your experts met with a whole lot of people and no one deposed those people either.

MR. BARON: Well, no one did, but people at least had the opportunity to, your Honor. We have attempted to depose class counsel on numerous occasions.

THE COURT: It's a rubric which has no relevance to this particular witness' testimony, and the objection is overruled.

[Tr. 196] BY MR. RICE:

Q. Professor Dash, from the — I'm going to refer to it as the spring of 1993 throughout the balance of 1993, did I continue to send you materials that were filed with the Court at your request?

A. Yes. You continuously kept me current on both motions, on replies to motions, orders and decisions of the Court, depositions — all things as they were occurring that you believed or at least that I was asking for and that you were complying with my request that I should have to continue to review these facts in order to be able to form an opinion and to keep advising you.

Q. At some point in time did you understand that depositions were being taken in this case?

A. Yes, I did.

Q. Did you request and have I provided you depositions for your review?

A. Yes, you did. Yes, I did request and you did provide those kinds of depositions that would be most helpful to me.

Q. And in addition to reviewing, did you read those depositions?

A. Yes, I did.

Q. And without going through them and specifically in all of them, did you read depositions of representatives from the CCR?

[Tr. 197] A. Yes, I did.

Q. And some of the class representatives?

A. Yes, I did.

Q. And some of the experts that were being proffered for testimony at trial?

A. Yes, I read the depositions and the testimony and saw most of the testimony of all of the opposition experts, and I read all of the testimony and depositions of the Settling Parties' experts.

Q. In addition to reading the depositions, did you request the opportunity to review the actual trial testimony of those same persons?

A. Yes, particularly the experts.

Q. And in addition to reviewing the transcripts of the trial proceedings or the hearing proceedings, did you actually physically appear in court and observe the testimony of Professor Cramton and Professor Koniak?

A. Yes.

Q. Were you here throughout their testimony?

A. Yes.

Q. And Professor Coffee, excuse me.

A. Yes.

Q. I want to focus with you on a few specific issues now, okay. You told us that you served on the ABA Standing Committee on Ethics and Professional Responsibility. I [Tr. 198] believe the time frame was 1984 to 1990; is that correct?

A. Yes, that's true.

Q. And as a member of that committee, did you become familiar with the procedures, the policy and the implementation of the policy of that committee?

A. Yes, I did. It's a small committee. There are about eight members on the committee, and each of us has the responsibility to

write opinions similar to the formal opinion 93-371. I wrote a number of such opinions. I also participated in the writing and editing of dozens of other opinions and the discussions of the committee as to what — in what cases we would agree to write opinions on and what our policy was, and this policy had been formed years before and we were merely carrying it forward. I became very familiar with the policy of the Standing Committee of Ethics and Professional Responsibility as to when they would write and release a formal opinion.

Q. Approximately how many requests for ethical opinions would that committee receive in a year's period of time?

A. I would say hundreds. They come in either by — in writing, they come by the phone. There's a staff that monitors the phone requests, but there are written requests that come in by lawyers from all over the country setting forth some sort of a factual request for an opinion.

Q. Now, the model rules or the code, the predecessor code, [Tr. 199] you told us that you've taught in the military setting, you've taught in the classroom setting, you've dealt with it in the legislative setting. Did the rules in the code change in any of those settings?

A. No. The rules themselves applied to all settings, but how they are applied and how they are interpreted obviously differs in individual fact situations and contexts.

Q. Does the ABA Standing Committee attempt to respond to each and every inquiry made of them for an ethical opinion or an advisory opinion?

A. Well, no. The —

Q. What is their policy about when they will issue —

A. They do not respond by writing a formal or informal opinion on every request that they receive. The policy of the Standing Committee of Ethics and Professional Responsibility is that if the request sets forth facts that is clearly answered by the rules themselves or by decisional law or prior ethical opinions, they will not write a new opinion, but they will direct the person requesting to the rule or to the decision or to the prior opinion. Only in situations where the fact situation as interpreted by the Standing

Committee to make it unclear and make it unlikely that a lawyer trying to act ethically would be able in that factual situation to correctly apply the Rules of Professional Conduct do they make the decision that an [Tr. 200] opinion is necessary to clarify the ethical rule in that factual situation. They call it a formal opinion and it is then published in order to assist and guide lawyers in that way. So we're the — that fact situation does not permit the ethics committee itself, which has the primary responsibility of interpreting the rules, to decide whether it can be that clear for lawyers generally.

Q. Would it be fair to say that they would not write opinions unless the area was gray?

A. Either gray —

MR. ROSENBERG: Objection.

THE COURT: Sustained, it's leading. Strike the answer.

BY MR. RICE:

Q. If the ABA committee issues a formal opinion, is there any general inference you can draw from the fact that they responded to an inquiry?

A. Based on my participation on that committee and my knowledge of the policy, whenever the ABA Standing Committee on Ethics and Professional Responsibility issues a formal or informal opinion, I can conclude that is the determination by the Standing Committee that the factual situation upon which they're opining is not clearly answered by the professional rule and it needs their guidance to lawyers on how to act in the future.

[Tr. 201] Q. Now, in the summer of 1993, early summer I guess, did you have the — did I make a request of you to review the ABA opinion 93-371?

A. Yes, and you sent it to me.

Q. And did I send you some additional documents at the same time?

A. At that time you sent me the January 14, 1993 settlement agreement involving the present inventories and the June 11th, 1993 revision agreement.

MR. ROSENBERG: Your Honor, I have an objection at this time to any further questioning in this area. Anything that goes beyond the offer, the offer yesterday was that Professor Dash was going to testify about how the ABA Standing Committee works based upon his knowledge and what in his view the meaning of the issuance of a formal opinion is. At this point it is my belief that there is an intention on the part of counsel to get into a discussion of whether the June 11th or January 14th — I believe June 11th agreement is in violation of 5.6B. That I submit is not a proper issue for rebuttal, since both ethics experts who have testified on behalf of the Settling Parties have addressed the issue squarely and have testified in their opinion that it did not violate the rules, which of course we don't agree with, but that's the testimony. So I object to this line of questioning at this point.

[Tr. 202] THE COURT: Mr. Rice, your response?

MR. RICE: Your Honor, I believe that the proffer we made yesterday and the deposition that we talk about, this was in the area. I turn to the transcript of yesterday, page 313, where Mr. Motley stated on line 6, "The effect of the American Bar Association opinion letters and the process that underlies the issuance of opinions regarding ethical matters, Professor Dash will testify about the June 11th, 1993 Ness, Motley agreement and the effect of the ABA opinion and what it means for the ABA to issue that opinion, and that's where we're going. In addition, last night at the deposition Mr. Baron on page 60 of the deposition went back into that same area. "Let's go to the effect of the ABA opinion letter on the June 11th, 1993 Ness, Motley agreement, in particular the effect of the ABA Opinion Number 93-371." And that's exactly what we're dealing with, which is what we proffered yesterday and what he was deposed on last night.

MR. ROSENBERG: Your Honor, my position is not that the proffer doesn't say that. I believe it's exactly what the proffer says. My position is that anything that goes beyond Professor Dash's introduction of new material into this case is not rebuttal. Everything that has been testified to with regard — all the issues about whether the June 11th agreement is ethical or not ethical, whether it violates any rules or violates any opinions has all been addressed in their case in chief. The only issues that have not been addressed in their case in chief, and the only issue that I've not —

and the issue that I have not objected to is Professor Dash's knowledge of how these opinions are written, and I think we're at the end of that road. To at this point now have Professor Dash testify about the same old substance of evidence that this Court already has is not rebuttal, and I object to it on that ground.

THE COURT: Any other response?

MR. RICE: From myself, your Honor?

THE COURT: Yes.

MR. RICE: I believe the question I was asking before the —

THE COURT: No, response to Mr. Rosenberg.

MR. RICE: Right, is we're dealing with the effect of the policy of the ABA as it relates to the June 11th, '93 agreement. And that's what we're dealing with and that was the next question and that's where we are.

THE COURT: No, my question to you — I'm asking you if you have any response to Mr. Rosenberg's statement.

MR. RICE: I don't believe that any further response other than we're within what we understood the Court to rule on yesterday that it was proper rebuttal to put that in context of the ABA opinion and the effect of that in light of the testimony.

[Tr. 204] THE COURT: All right. You're not responding to just what he said, I think you ought to know that. I don't think so.

I'm not going to cut it that close. I'll allow the testimony. I don't know whether it's true rebuttal or not. This is not a trial of a case, I'm going to say it for the 15th time. I have some latitude, it's a non-jury proceeding. I'm interested in what he has to say. It may be useful to both sides once he's cross-examined. I don't know where it's going to come out, but there's been adequate notice of it under all the time circumstances we've had, and I think it's fair to proceed and I so rule.

BY MR. RICE:

Q. Professor Dash, based on your experience as a member of the ABA Standing Committee, your knowledge of the policy, your review of the 93-371 opinion and review of the June 11th, 1993 agreement, do you have an opinion concerning the response of

Ness, Motley in revising its prior agreement and replacing it with the June 11th, 1993 agreement?

A. Yes.

Q. Would you tell us what that opinion is, please?

A. My opinion is that the ABA formal opinion, 93-371, raised some questions concerning the language of the January 14, 1993 agreement but clearly because of the interpretation I give to this opinion was also evidence that lawyers could [Tr. 205] differ on what that agreement meant and needed this opinion to clear it up. The fact that shortly after this opinion was released and published that the class counsel revised the January 14th, 1993 agreement, actually superseded it, through the June 11th agreement, and it's my opinion that was an effort of class counsel even though they may have disagreed with the opinion of the ABA to conform as much as they possibly could to the ethical opinion and conduct themselves in accordance with the way the ABA Standing Committee said lawyers should. So I see this as an ethical response by lawyers once having been given an opinion by the Standing Committee of Ethics and Professional Responsibility.

Q. Professional Dash, I want to turn your attention to another matter now. I believe you were in the courtroom when Professor Koniak testified. I want to call your attention to her testimony that basically went that the AFL-CIO had no place in serving a monitoring role in the Georgine settlement. I ask you first, sir, do you agree or disagree with that statement?

A. I disagree with it.

Q. And would you tell us from your review of the facts of this case your knowledge and experience in the field of ethics and professional responsibility, is there anything inappropriate or unethical with the monitoring role to be served by the AFL-CIO in this case?

[Tr. 206] A. It is my view that class counsel, particularly when there has been some question raised as to their so-called dual role and monitoring function acted appropriately in bringing into the settlement agreement a function and role of the AFL-CIO, a union to which a-large number of class members belonged and would have a very important interest in this claims — new claims

administrative program to monitor and actually sit on the shoulders of the class counsel. I can see nothing inappropriate. It can only have salient effects in the proper administration of this claims program.

Q. Professor Dash, in your opinion, was the inclusion of the AFL in the monitoring or watchdog role that was added by class counsel in any way go to the issue of — or to support the allegation of inadequacy of class counsel?

A. No. I would say the other way around. I think it demonstrated that class counsel was doing everything it could to ensure that there was a kind of monitoring role for a major union that had as its best interest, a large number of the class.

And it would seem to me that even though there were other members of the class who were not members of that union, they would derive the benefit of that particular monitoring role. So I would think that far from showing inadequate representation by class counsel, it demonstrated [Tr. 207] an effort by class counsel to carry out its fiduciary responsibilities to its members, to its clients.

Q. I want to focus on the third area at this time. You also were here when Professor Cramton testified, and I believe you've also reviewed his testimony, is that correct?

A. Yes.

Q. And do you recall that he testified about four conflicts in which offered opinion concerning class counsel. And, the fourth one that he focused on was a conflict due to the lawyers having an economic interest in the case, do you recall that discussion?

A. Yes, I do.

Q. All right. First I ask you sir, do you agree with Professor Cramton that because of class counsels' economical interest, that this represents an impermissible conflict of interest?

MR. PYLE: Objection to the form of the question. don't believe they — unless he cites the specific line, I don't believe Professor Cramton said that that was an impermissible conflict of interest which is a term of art that I'm sure this witness understands, between conflict of interest and impermissible conflict of interest. So think a line and page cite is needed.

THE COURT: There may be some importance to that, but do we have a citation, Mr. Rice?

[Tr. 208] MR. RICE: Your Honor, the discussion took place on the 15th of March in the a.m. on Page 119 through 121.

THE COURT: Why don't we —

MR. RICE: I have an extra copy of those pages for the Court.

THE COURT: I can find them also, but why don't we just give those to the witness, and then we'll be all right.

MR. RICE: We'll do that.

THE COURT: At least we'll have what you want to talk about.

MR. RICE: Yes, sir.

THE COURT: I don't know whether it will include everything that is necessary, we'll find that out.

MR. RICE: 15, a.m.

THE COURT: Do you have that, Professor Dash?

THE WITNESS: Yes, I do, your Honor.

THE COURT: Mr. Rice, with the use of these papers for a specific reference, you may proceed.

MR. RICE: Okay.

BY MR. RICE:

Q. I'm calling your attention to this area of Professor Cramton's testimony.

Are you familiar with this?

A. I am familiar with this testimony. I've read it recently and I just looked at it again, and I think I can respond to [Tr. 209] it.

Q. All right. Would you please tell us whether you agree or disagree with Professor Cramton's testimony there in this area?

A. I disagree with it, and for the following reasons: Professor Cramton did speak of impermissible conflicts of interest, but he grouped the final impermissible conflict into what he called four separate conflicts of interest.

I believe the very first one he said was a concurrent conflict between the present clients and the future clients.

He then said another conflict was the dual role that class counsel was playing in monitoring and also accepting class members as clients.

A third one he said was the conflict between the obligations to a third-party, which I believe he meant to be and said was CCR, that was limited, he said, the ability to represent the class members.

And the fourth one, he said was that the lawyers, the plaintiffs, counsel in the inventory settlement as class counsel to the class had a financial conflict of interest and then he focused on what he meant by financial conflict of interest and he said the fees that they would earn.

The fees they would earn from the settlement of an inventory settlement, and the fees that they would earn, [Tr. 210] contingent fees in representing individual members of the class and filing claims under the Georgine class settlement.

And then I think what he was doing was that putting all these things together, he was saying this all worked up to a very large impermissible conflict of interest.

Although I don't believe that he was weighted each one the same. On this final one that you've asked me about, his statement and his belief and opinion that a lawyer gets into a conflict of interest with his client because of the fee the lawyer will earn, is I think a very strange conclusion and statement. I have never seen it anywhere in either an ethical opinion, a court case or in any of the literature.

It would seem to me that if that were true, every lawyer who represents clients for a fee, and if what he means, contingent fees and all lawyers who represent clients on contingent fees are disqualified from representing their client, because the very fact that they're going to become enriched by the fee, prevents them from loyally representing their client. So that has to be wrong under the model rules because the rules provide for fees, provide for contingent fees, and assume that lawyers will be professional and even though they're getting paid money, that that in and of itself should not limit their representation.

The — from my opinion and my knowledge of the rules [Tr. 211] of professional responsibility and conduct, that the only types of conflicts that involve lawyers' personal financial interests are ones in which the lawyer has a financial interest in the business itself or the subject matter of the representation, has a stake in it. That's the situation where the lawyer could not fully consider the interest of the client because his own personal financial interest in that subject matter interferes.

But I've never, never heard, read or seen a situation where the fact that the lawyers' going to get a fee can in any way be considered a conflict.

Q. Professor Dash, in your opinion, is there anything unethical, inappropriate or evil about the class counsel in a class action receiving a fee for its work if awarded by the Court?

A. No. Not at all.

MR. BARON: Your Honor, I didn't get up quick enough. I don't think he's been tendered as an expert on evil.

THE COURT: I don't —

THE WITNESS: May I respond, your Honor? Professor Koniak said she was not, but I think I've dealt in my investigation through the years with quite a bit of evil.

(Laughter.)

THE COURT: The motion to strike the word evil from [Tr. 212] the question and answer is denied. I don't believe that's issues before the Court either, but it doesn't taint the testimony. It doesn't require surgical removal of that word. I don't think anyone's claimed anyone's evil in this case, nor is there that issue before me as a matter of law. I haven't been wounded by listening to that word.

BY MR. RICE:

Q. Professor Dash, I want to call your attention to the transcript in front of you that's dated March the 17th, 1994, p.m., Page 196, 197, Koniak direct.

A. I have before me — did you say March 17, 1994?

Q. Yes. P.M.

A. P.M., I see it.

Q. Can you take a moment and review that? Okay?

A. Yes.

Q. All right. I want to focus with you on the testimony that Professor Koniak gave concerning the notice and the development of the notice.

A. Yes.

MR. RICE: Page 196.

THE WITNESS: Yes, I have it.

BY MR. RICE:

Q. Okay.

THE COURT: Excuse me, counsel.

(Pause in proceedings.)

[Tr. 213] THE COURT: I would usually go a little longer, but I have a mini emergency I have to take care of, nothing personal, but we'll take a 15-minute recess. It will be our afternoon recess hopefully.

(Recess, 2:55 o'clock p.m. to 3:15 o'clock p.m.)

THE COURT: All right. Welcome back, everybody. we'll proceed. Please be seated.

We're working on Professor Koniak on direct, March 15th, 1994, Pages 196 to 197.

MR. RICE: Correct, your Honor.

THE COURT: Is that where we were?

MR. RICE: We're talking about notes.

BY MR. RICE:

Q. Professor, I want to refocus on where we were. And I want to deal with the Court's implementation of the notice plan or the substance of the notice plan. I only want to deal with what Professor Koniak said about the role of class counsel in developing the notice, okay?

A. Yes.

Q. And that's what we're here to deal with.

Do you have personal knowledge as to the involvement of class counsel in the development of the notice?

A. Yes, I do.

Q. Would you tell the Court about that?

A. From the very beginning that class counsel met with me, [Tr. 214] and discussed the professional responsibility that they had in representing the class, the subject of notice as to class members was uppermost in my mind and I emphasized that since — in this particular innovative settlement that would involve both known members and unknown members, literally thousands of them and some who were unimpaired but called pleural plaque cases who may not have symptoms, that it was very important that the notice in this case that would be presented to the Court for approval was as broad a notice and as meaningful a notice as class counsel could develop so that it would reach as much as humanly possible everybody who should be reached who then would be on notice to respond back to class counsel.

Q. Then —

A. And primarily I was interested in the fact that since this had an opt-out provision, that anybody who might be — everybody should be notified so that they would have an opportunity to fully weigh the pros and cons of the — of it and opt out if they wished.

Q. And during the summer of 1993 and the early fall of 1993, do you know from your own knowledge whether or not Mr. Motley and myself were dealing with development of the notice and the plan of —

A. Yes, I do, because there was constant discussion with me and requests for my advice on it. I gave that advice. There [Tr. 215] were a number of hours of discussion.

When the so-called notice package had been developed by the consultants in this matter, at my request, Mr. Rice, you brought it to me and had me review it and I did review it and I did indicate that it contained the kind of notice that I felt that should be presented to the Court, that these were the things that I thought ought to be in it.

And all my discussions were with class counsel and very active discussions.

Q. And do you recall meetings taking place where Mr. Locks, Mr. Motley and myself met with you going over the notice and where we developed information to give back to others —

A. Yes, I do.

Q. — about the notice?

A. And that was very true that such information was developed and my understanding was it was to go back and be part of as input into the notice package.

(Pause in proceedings.)

Q. Now, just so we put it in context. You told us at the beginning of our consultation with you that you were not an expert in class action, is that correct?

A. Yes.

Q. And so we did not ask you to get involved or to review anything concerning the implementation of the notice and stuff of that nature?

[Tr. 216] A. That's true.

Q. Okay. Professor Koniak's inference that class counsel was inadequate because they were not involved in developing the notice, is that true from your own personal knowledge?

A. From my personal knowledge, it's not true.

(Pause in proceedings.)

Q. I want to turn with you to the materials in front of you dated March the 15th, 1994, a.m. — strike that. That's not the right one.

I want to talk to you about yesterday's witness, Professor Coffee. You were here and heard Professor Coffee, is that correct?

A. Yes.

Q. You went through some of your background for us earlier today. I ask you, sir, do you believe that you have dealt with extensively and developed extensive expertise in the area of collusion?

A. Yes. Both by my teaching, my being a prosecutor, both federal and state, my being an investigator on matters that involve

collusion. I think I've had extensive experience with that concept in law and in fact.

Q. Do you recall yesterday observing and listening to Professor Coffee's testimony in the definition of collusion and the application of that definition to this case?

A. Yes, I did hear him testify to that.

[Tr. 217] Q. And do you agree with the definition of — or Professor Coffee's definition of collusion?

A. I disagree with his application of the definition. My recollection is that he referred specifically to Black's Law Dictionary definition and somewhat widely used that definition. Primarily I focused on his reference and acknowledgment that the definition whether it's from Black's or any legal definition of collusion, in criminal or civil matters, must involve an agreement to engage in fraud or deceit.

My disagreement is his testimony that collusion, that includes fraud and deceit, did not require any evidence of intent, a scienter or mens rea of subjective intent.

His testimony was, his opinion was that it could only be an objective set of facts and I concluded from his testimony that he was basically saying that negligence alone by a lawyer could involve collusion. I disagree with that. I know nothing in the law or any application of any concept of collusion in cases, civil or criminal or ethical, where a lawyer can negligently be involved in collusion.

Such concepts as fraud and deceit require at least general intent. There doesn't have to be specific evidence of the intent such as a confession or a document that says I intend, but there must be sufficient evidence upon which a jury or court can infer that there was such an intent and [Tr. 218] that intent should be knowingly.

The rules of professional conduct whenever they deal with issues of fraud or deceit by a lawyer, always have within it the word "knowingly." And knowingly has been interpreted to mean willfully and intentionally engaging in that conduct with knowledge of all the circumstances.

And therefore, I do disagree that you could have, as Professor Coffee testified, collusion with fraud and deceit without any proof of subjective intent.

Q. Professor Dash, does fraud and deceit require intent?

A. Yes.

Q. And are fraud and deceit essential elements of collusion?

A. Yes, under all the — all the definitions I've seen in collusion.

Q. Professor, do you have an opinion about whether — or based on your knowledge, your experience, your education, your dealing with the area of civil collusion, criminal collusion, your observing the testimony here and your reviewing the testimony in the transcript, do you have an opinion about whether class counsel acted in collusion with anybody else in order to bring about this stipulation of settlement?

A. Yes, I do have an opinion.

Q. What is that opinion?

A. My opinion is there's no evidence that I have seen, and [Tr. 219] I've read all the testimony and the transcript, the depositions, and I have seen no evidence in the record before this Court that would lead me to conclude there's any evidence of collusion, fraud or deceit on the part of class counsel.

Q. Professor, when you do consulting work for law firms or attorneys or others, do you routinely charge for your time?

A. Yes, I do.

Q. And are you charging for your time that you've —

A. Yes, I am.

Q. — consulted with us in this matter?

A. Yes, I am.

(Pause in proceedings.)

Q. Let me ask you to turn with me to the final area I want to talk about, the March 16th, 1994 transcript, Page 81, 82 of Profession Cramton.

(Pause in proceedings.)

Q. Do you have that in front of you?

A. Yeah, I see it. It's a very poor copy, but I think I can read it.

Q. Do you need a better copy?

A. Yeah. It's hard for me.

(Pause in proceedings.)

A. A little better. It's darker.

(Discussion off the record.)

[Tr. 220] A. Yes, I've read it.

Q. Okay. You've told us that you've been involved in the practice of law since 1950 and the teaching of law and professional responsibility for over 35 years.

Tell us about your involvement with the ABA standing committee on ethics, your teaching in the area of ethics —

MR. ROSENBERG: I'm going to object to the review of Professor Dash's resume and ask that he ask a question.

THE COURT: I think it's well taken. Mr. Rice, you don't have to give a speech, just ask questions.

BY MR. RICE:

Q. Professor, Professor Cramton testified that historical background is not relevant to an analysis of ethical issues. From your experience that you set forth for us earlier, do you agree or disagree with that testimony?

MR. ROSENBERG: Excuse — I'm sorry, Mr. Rice. I have a — just a request for the line and page of that quotation.

MR. RICE: Page 81, the answer given to the question was, "That's right," and I have to —

MR. ROSENBERG: Page 81, what —

COUNSEL: 15.

MR. RICE: 16.

MR. ROSENBERG: 16, Page 81.

COUNSEL: I'm sorry, what line?

[Tr. 221] MR. RICE: 6 — 15.

(pause in proceedings.)

BY MR. RICE:

Q. Do you see what I'm referring to?

A. Yes, I do.

Q. All right.

THE COURT: It's the question starting at Line 10 and the answer finishing at Line 18.

MR. RICE: Right.

BY MR. RICE:

Q. Looking at that area, I'd ask you, sir, do you agree or disagree with Professor Cramton that the historical background is relevant to the ethical issues? Do you believe it's relevant or irrelevant to the ethical issues?

A. I think it's very relevant particularly as I understand his testimony, and having just read it again, that he includes in the historical background with regard to this particular case, the asbestos litigation crisis that led to the Rehnquist Commission report and recommendations, the MDL show cause order and all of the things that led up to the initial meetings between CCR and plaintiffs' counsel.

It is my opinion that rules of ethics, the — now talking about the rules of professional conduct are guides to lawyers and do not change in class action suits or mass tort suits but they are guides that have to be interpreted in the [Tr. 222] context of the fact situation in which lawyers are acting.

Lawyers must make judgments and it's their judgments that count in terms of whether or not they're violating rules. And there's no automatic application of Black Letter Rules of Ethics such as a computer where you put it into a computer and it comes out with an answer. You must take what the — you must take the context in which the lawyers are acting in determining whether the lawyers are acting professionally and ethically.

And therefore, I would believe that Professor Cramton is absolutely wrong that they're irrelevant. That they're very relevant in this case and would guide an expert in ethics in judging whether the lawyers acted ethically or not. And that context has to be taken into consideration.

MR. BARON: Your Honor, I object and move to strike. The section on Page 81 that he's referring to merely says that Professor Cramton didn't read the Rehnquist Report, period, because he couldn't understand how the Rehnquist Report was relevant, period.

(Pause in proceedings.)

MR. BARON: The question was asked, "You've not heard of it, let alone read the so-called Rehnquist Ad-Hoc Committee Report?

"Answer: That's right. I have to confess I haven't gone back to read some of that historic background because [Tr. 223] I'm not sure how it bears on the conflict of interest question, period."

(Pause in proceedings.)

MR. BARON: I don't believe — I believe he's taken the answer completely out of context, your Honor.

THE COURT: Well — Mr. Rice, do you have any response?

MR. RICE: Your Honor, number one, this is exactly what we read to the Court yesterday in the argument when we were presenting the argument about rebuttal, but also I believe that reading that in fair context and reading the follow-up question that he's saying that he didn't pay any attention to the historic stuff, that it shouldn't be paid any attention to by anyone because it was irrelevant.

And we believe that that's proper rebuttal to that is to put it in context.

THE COURT: Well, it's up to me to decide whether Professor Dash's observation is accurate in light of the testimony. I'm not going to strike it out. Maybe when I compare what he says to this, I'll agree with you, maybe I'll agree with Mr. Rice, I don't know yet. But if that's his interpretation of what the testimony was, that's his interpretation. It's faulty. It doesn't have any weight.

MR. BARON: Well, my argument was that's not what the testimony says. That's not the point that he made.

[Tr. 224] THE COURT: That's argument. The motion's overruled.

BY MR. RICE:

Q. Professor Dash, taking in your knowledge, your experience, your involvement, your review of the public filings on this case, and the information that you reviewed from the transcript and the depositions that have been offered and the observations you've made in court, do you have an opinion as to whether or not the conduct of class counsel in the historical background that was presented and the facts that were presented was ethical conduct?

MR. ROSENBERG: Objection. Now, that goes beyond the scope of the proffer. He was proffered specifically on the issue of whether it's necessary to consider historical conduct in evaluating ethical behavior. He was not proffered on the issue of whether having now considered the historical conduct, the behavior is ethical or not and in fact was not examined in his deposition —

MR. RICE: I'll withdraw the question. They tell me that they want to go home today sometime.

MR. ROSENBERG: I'm not finished with my objection.

(Laughter.)

COUNSEL: Come on, he hasn't won one all day. Let him win this one.

(Laughter.)

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

SETTLING PARTIES'
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DATED: May 16, 1994

* * * *

47. The medical requirements in the Stipulation to qualify for compensation are, by contrast, more stringent than those required under the law of most states to present a jury issue in an asbestos claim. As explained in the Proposed Findings of Fact, there are two aspects to the medical requirements. First, there are a series of requirements which are essentially quality control requirements. In this category are requirements such as that chest X-rays be read by a certified B-reader, and that diagnoses be made by physicians who are board-certified in certain specialties. P.F.F. ¶ 96. The second aspect to the medical criteria are a set of requirements which are designed to qualify for current cash compensation only those class members with some sort of asbestos-related breathing impairment or asbestos-related cancer. P.F.F. ¶ 108. Thus, the fairness of both of these aspects to the medical criteria must be evaluated.

48. The quality control aspects to the medical criteria are plainly reasonable. The Settling Parties presented several medical experts who explained why, for example, the B-reader requirement is needed to ensure consistent and accurate reading of the chest x-rays. P.F.F. ¶ 162. These medical experts also explained why the quality control requirements set forth in the medical criteria are workable and will not be burdensome for class members. *Id.* at ¶¶ 106, 152, 154, 161-62. Indeed, few objections to these quality control measures were made. *Id.* at ¶ 106. Even the primary medical expert

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BACK-END OPT-OUT
MESOTHELIOMA CASES

Three-Year Case-Flow
Analysis

# of cases seeking entry each year	Delay for Applicants Applying at Beginning of Year 2[1]	Delay for Applicants Applying at Beginning of Year 3[1]	Delay for Applicants Applying at Beginning of Year 4[1]
14(2%)	Approx. 1 year (No backlog)	Approx. 1 year (No Backlog)	>2 years (Backlog 1 case)
28(4%)	Approx. 2 years (Backlog 14 cases)	>4 years (Backlog 28 cases)	>5 years (Backlog 43 cases)
42(6%)	Approx. 4 years (Backlog 28 cases)	>6 years (Backlog 56 cases)	>9 years (Backlog 85 cases)
56(8%)	>5 years (Backlog 42 cases)	>8 years (Backlog 84 cases)	>13 years[2] (Backlog 127 cases)
70(10%)	>6 years (Backlog 56 cases)	>11 years (Backlog 112 cases)	>17 years[2] (Backlog 169 cases)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF MICHAEL T. WARD

Michael T. Ward, being first duly sworn, does depose and state as follows:

1. I am an attorney at law and a member in good standing of the bars of Delaware, Maryland and Virginia. I have been an attorney in the Law Offices of Peter G. Angelos for the last ten years. Recently I have worked extensively on the case of Dr. Richard E. Blanchard, who I have met with personally on many occasions, including, but not limited, to representing him in his discovery and *de bene esse* videotape depositions taken on June 27, 1994 and July 6, 1994 respectively. The facts stated below are based on my conversations with Dr. Blanchard and/or upon his sworn testimony;

2. Dr. Richard E. Blanchard is a 61 year old periodontist who was diagnosed with malignant mesothelioma on February 8, 1994 based on a needle biopsy performed at the DePaul Medical Center in Norfolk, Virginia. That diagnosis has since been confirmed by pathologists at Brigham & Women's Hospital and the Mayo Clinic.

3. Dr. Blanchard was exposed to asbestos in the summers of 1952 and 1953, when he worked at Newport News Shipbuilding & Drydock as a pipefitter's helper to earn money for college, and from April through July of 1962, when he was on board the U.S.S. Sierra as a dental officer during a FRAM overhaul of the ship at the Norfolk Naval Station shipyard at Portsmouth, Virginia. Dr. Blanchard has identified, *inter alia*, Armstrong and Ruberoid pipecovering and cement as products applied by asbestos workers in his immediate vicinity during the summer of 1953 and Ruberoid pipecovering as a product applied in his vicinity in 1962. In addition to the plaintiff's identification of asbestos products for which CCR members Armstrong World Industries, Inc. and GAF Corporation are responsible, there is ample evidence incriminating other CCR members, including C.E. Thurston which distributed and/or installed asbestos materials applied plaintiff's vicinity.

4. Dr. Blanchard, who has been a leading periodontist in the Tidewater area of Virginia since 1964, earned $409,583.96 in salary and $30,000 in profit sharing in 1993. Prior to developing mesothelioma, he planned to work until age 70, as documented by the records of his financial planner. Dr. Blanchard has now reduced his work load due to the increasing symptoms from his mesothelioma and will soon have to retire. In addition to the extraordinary loss of salary and other compensation, the operation of the buy/sell agreement with his partner will result in a substantial loss given the historic and projected growth of the practice.

5. Prior to developing mesothelioma, Dr. Blanchard was in excellent health. He is a life time non-smoker who exercised regularly and carefully watched his diet. His mother lived to the age of 99.

6. Dr. Blanchard will be survived by his 37 year old wife and 4 adult children from his first marriage, all of whom will have substantial claims under Virginia's wrongful death statute.

7. Prior to the opt out deadline of January 24, 1994, Dr. Blanchard had no notice or knowledge of the *Georgine* class action. Specifically, he did not receive any direct mailing regarding the class action and did not see any broadcast or published notice of the class action. Except for the summer of 1952 and 1953, Dr. Blanchard has never been a member of a labor union and, therefore, never received any notice of the class action through such bodies.

8. Prior to the opt out deadline of January 24, 1994, Dr. Blanchard had no knowledge that he had sustained any injury from his exposure to asbestos.

9. The undersigned has discussed the terms and conditions of the *Georgine* class action settlement with Dr. Blanchard, who has requested the undersigned to take all possible steps to have his case opted out of the class action settlement.

/s/ MICHAEL T. WARD

[Jurat Omitted]

AFFIDAVITS IN SUPPORT OF CARGILE MEMORANDUM IN OPPOSITION TO CCR MOTION FOR PRELIMINARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF JOHN SOTERIOU

I, John Soteriou, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in San Carlos, California.

3. I have been employed as a plumber since 1960. Throughout my years of employment, I have engaged in the new construction and remodeling of commercial buildings where I was exposed to the removal and installation of asbestos pipe insulation and other asbestos-containing materials, including asbestos cement pipe.

4. I was not diagnosed with mesothelioma until April 1994. Prior to my diagnosis, I was not aware that I had mesothelioma or any asbestos-related disease.

5. I did not opt out of the *Georgine* v. *CCR* class settlement.

6. I did not file a lawsuit against any asbestos defendant for my own asbestos-related injuries prior to January 15, 1993.

7. I filed a lawsuit in Alameda County Superior Court for my asbestos-related injuries on May 13, 1994.

/s/ JOHN SOTERIOU

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF HAROLD HANS EMMERICH

I, Harold Hans Emmerich, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in Santa Clara, California.

3. From April 1942 to April 1943 I worked for Western Pipe and Steel Company as a machinist on board ship during the new construction of ships. I worked in the engine and boiler rooms and worked around large amounts of asbestos. From 1950 until 1968 I worked for California Water Service supervising the cutting and installation of asbestos cement pipe.

4. The doctor first suspected I had mesothelioma in February 1994. However, I was not definitely diagnosed with mesothelioma until June 17, 1994 when a biopsy was performed and the biopsy tissue was analyzed. Prior to my diagnosis, I was not aware that I had mesothelioma or any asbestos-related disease.

5. I did not opt out of the *Georgine* v. *CCR* class settlement.

6. I did not file a lawsuit against any asbestos defendant for my own asbestos-related injuries prior to July 6, 1994 at which time I filed a lawsuit in Alameda County Superior Court for my asbestos-related injuries.

/s/ HAROLD HANS EMMERICH

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF THOMAS COREY

I, Thomas Corey, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in Napa, California.

3. I was an electrician employed at Hunters Point Naval Shipyard from July 1943 to May 1945 and from February 1947 to July 1973, and at Mare Island Naval Shipyard from July 1973 to October 1984. I worked aboard all types of navy vessels, installing, repairing, and testing electrical systems throughout these ships, including work within engine and boiler rooms. Throughout my career, and on a continual basis, I was occupationally exposed to asbestos-containing insulation products used on board ships.

4. I was not diagnosed with mesothelioma until June 1994. Prior to my diagnosis, I was not aware that I had mesothelioma.

5. I did not opt out of the *Georgine* v. *CCR* class settlement.

6. I did not file a lawsuit against any asbestos defendant for my own asbestos-related injuries prior to January 15, 1993.

7. I filed a lawsuit in Alameda County Superior Court for my asbestos-related injuries on August 8, 1994.

/s/ THOMAS COREY

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

REPLY MEMORANDUM OF THIRD-PARTY PLAINTIFFS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNT I OF FIRST AMENDED THIRD-PARTY CO-COMPLAINT AND IN OPPOSITION TO THE CROSS-MOTIONS OF THIRD-PARTY DEFENDANTS

* * * *

insurers suggests that under the circumstances this notice was untimely.[29] *See Mighty Midgets, Inc.* v. *Centennial Ins. Co.*, 416 N.Y.S.2d 559, 563 (N.Y. 1979) (timeliness of notice not determined "simply by how long it was before written notification came forth" but rather by "what was a reasonable time in the light of the facts and circumstances of the case at hand;" the "crucial" question is "the reason [the policyholder] took the time it did").

In addition, as noted in the Producers' Memorandum, it is not clear how the notice provisions of the policies should be applied to the circumstances of this extraordinary settlement. The notice provisions cited by the insurers call for notice of a claim when asserted or in some cases for notice of circumstances "likely to

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[29] The full complement of insurers whose policies were potentially implicated by the Settlement was not identified until late December. The determination of which policies could be called upon depended upon a definitive evaluation of the likely cost of the Settlement and on the finalization of the Producers' shares. In addition, the process of locating and reviewing several thousand policies dating back to the 1930s, identifying policies that would be unavailable because of exhaustion or because of the demise of the insurer, and identifying successors to original insurers, took many weeks to complete. *See* Murray Decl. ¶¶ 3-6.

result in a claim." *See* Ins. Mem. at 78-79.[30] Although the result of the eventual Stipulation of Settlement was a class claim, it was not a claim of the usual kind. It was instead the claim of a settlement class, the settlement of which did not resolve any previously asserted claim. *See* Producers' Mem. at 47-48. The Settlement was in substance an agreement structuring the future resolution of as yet unasserted claims. The requirements applicable to asserted claims or to the settlement of such claims cannot reasonably apply in the same way to such a *sui generis* agreement.[31]

2. The Insurers Were Not Excluded From the Settlement Process

The insurers also argue that they were deprived of their right to control the defense and settlement of the underlying claims and of their related right to avoid coverage of any "voluntary payment" agreed to by a policyholder without their consent. *See* Ins. Mem. at 72-77. Put in its boldest form, their contention is that "[u]nder the policies, [the insurer] alone has the right to make settlements as it 'deems expedient.'" Md. Cas. Mem. at 45. The less extreme contention is that these rights were breached by the alleged exclusion of the insurers from the settlement process.

Even if the insurers were not disqualified from control of the defense and settlement by their conflicting interest, it is obvious that, if the insurers had conducted the settlement negotiations, there neither would nor could have been a settlement. In the first place, class counsel fearing premature disclosure would not have negotiated with the insurers. Second, with their internal differing

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[30] The insurers assert that notice was required "as soon as it because [sic] apparent that a class action suit might be filed," Ins. Mem. at 79 (emphasis added), but the cited language of their policies does not support that assertion.

[31] In response to this point, the insurers say that "most policies require the insured to provide notice not only for a 'claim' but also of any 'occurrence' or 'injury' or 'loss' that is *likely to result in a claim against the insured*." Ins. Mem. at 78 (emphasis in original). But the prospect of a futures class settlement was not an "occurrence" giving rise to any new liability, much less an "injury" or "loss."

interests, it is impossible to imagine the insurers agreeing among themselves — and with the Wellington insurers who are not parties to this proceeding as well — on negotiating objectives and a coherent strategy with the requisite flexibility. Third, as shown above, no insurer had as strong an interest as the Producers in achieving a comprehensive settlement. Indeed, the insurers'

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